(22,316.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 695.

ROBERT VAN IDERSTINE, TRUSTEE IN BANKRUPTCY OF ABRAHAM FELLERMAN AND ISIDOR J. FELLERMAN, INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF A. FELLERMAN & SON, APPELLANT,

vs.

THE NATIONAL DISCOUNT COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

ROBERT VAN IDERSTINE, as Trustee, etc., Complainant-Appellee,
vs.
THE NATIONAL DISCOUNT COMPANY, Defendant-Appellant.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

1 United States District Court, Southern District of New York.

ROBERT VAN IDERSTINE, Trustee in Bankruptcy of A. Fellerman & Ano., Bankrupts, Pl'ff-Appellee,
against
THE NATIONAL DISCOUNT COMPANY, Defendant-Appellant.

Statement.

1907.
May 23. Complaint filed.
June 28. Answer filed.
1908.
April 1. Replication filed.
Dec. 8, et seq. Cause tried before Hon. George C. Holt, *D. J.* and a jury.
" 11. Verdict for plaintiff. Stay of 60 days granted.
1909.
Jan. 4. Judgment entered.
Jan. 20. Order denying motion for new trial filed.
Mch. 1. Petition for allowance of appeal and citation on behalf of defendant filed.
" " Assignment of errors filed.

2 United States District Court, Southern District of New York.

ROBERT VAN. IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidor J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant,
against
THE NATIONAL DISCOUNT COMPANY, a Corporation Organized under the Laws of the State of Maine, and Abraham Fellerman and Isidore J. Fellerman, Individually and as Copartners, Trading under the Name of A. Fellerman & Son, Defendants.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The complainant above named, by James, Schell & Elkus, complains of the above named defendants, and respectfully alleges on information and belief:

I. That on or about August 19th, 1905, a petition in bankruptcy was filed against Abraham Fellerman and Isidor J. Fellerman & Son, and such proceedings were thereupon had that thereafter, on or about the 21st day of September, 1905, said Abraham Fellerman and Isidor J. Fellerman, individually, and as members of the firm of A. Fellerman & Son, were duly adjudicated bankrupts.

3 II. Such proceedings were thereafter had that above named complainant was duly appointed Trustee in Bankruptcy of the estate of Abraham Fellerman and Isidor J. Fellerman, and as members of the firm of A. Fellerman & Son. Complainant thereafter duly filed the bond required of him, which bond was duly approved, and complainant has since that time and still is, acting as such duly qualified Trustee.

III. On information and belief, that on or about the 15th day of August, 1905, the defendant Abraham Fellerman, on behalf of the firm of A. Fellerman & Son, executed a certain agreement with the National Discount Company, a corporation organized pursuant to and under and by virtue of the laws of the State of Maine, a copy of which agreement is hereto annexed and marked "Exhibit A," and is made a part hereof as if here full- set forth. That pursuant to said agreement various accounts receivable were transferred to the National Discount Company by the firm of A. Fellerman & Son on the 15th day of August, 1905, and various accounts were transferred on the 18th day of August, 1905.

IV. On information and belief, that the National Discount Company advanced to the firm of A. Fellerman & Son on the security or the pretended security of the accounts so transferred the sum of $4,006.33.

V. On information and belief, that the aggregate amount of the accounts transferred was $7,727.89.

VI. On information and belief, that the National Discount Company collected on said accounts $5,612.71, of which it turned over to complainant $767.33, retaining $4,845.38, i. e., charging for alleged interest, commission, expenses, etc., $839.05; that within forty days after it advanced to A. Fellerman & Son said $4,006.33,

4 it collected upon the accounts transferred to it upwards of that amount, and that for the use of the said $4,006.33 for about forty days it therefore charged $839.05.

VII. On information and belief, that all the transfers of said accounts receivable were made by the said bankrupts within four months preceding the filing of the petition in bankruptcy, and at the time of the execution of said agreement "Exhibit A," and at the time of each and every transfer of the accounts above referred to, the said firm of A. Fellerman & Son and the members thereof were hopelessly insolvent and about to fail in business, and knew that such condition existed. That the total liabilities of the said firm and of the members thereof at the time of the said transfers were in excess of Thirty Thousand Dollars ($30,000.00), and the total assets, exclusive of property transferred or concealed with the intention to hinder, delay and defraud creditors, was less than Ten Thousand Dollars ($10,000.00).

VIII. On information and belief, that the said agreement, "Exhibit A," and said transfers of accounts, made thereunder, were made with the intention on the part of said bankrupts and in pursuance of a fraudulent device and scheme on their part to hinder, delay and defraud their creditors, and were a part of a fraudulent scheme and conspiracy entered — between them and the National Discount Company thereby to hinder, delay and defraud creditors of said bankrupts, and said National Discount Company had full knowledge of said fraudulent intention and was not a purchaser in good faith of said accounts, nor did it pay a present fair consideration, but took said transfers with the intention to aid the consummation of the said fraudulent scheme of said bankrupts.

IX. That there has not come into the hands of this complainant as Trustee of the estate of Abraham Fellerman and Isidor J. Fellerman, individually, and as members of the firm of A. Fellerman & Son, sufficient moneys to pay in full the claims of creditors filed in the said proceeding, and that the moneys so received by this complainant as Trustee will not pay fifteen per cent. of the amount of the proved claim filed herein.

X. That before the filing of this complaint complainant duly demanded of the said defendant, The National Discount Company, to account to and render over to him all moneys collected by the National Discount Company on said accounts so transferred, and said National Discount Company refused and still refuses to comply with said demand.

Wherefore, complainant demands judgment that said transfer be set aside as fraudulent, and that the said defendant, The National Discount Company, account to the complainant for all the moneys received from said accounts, and that it be directed to turn over all the said moneys to the complainant as Trustee, and for such other and further relief as may be just and proper in the premises.

May it please your Honors to grant unto this complainant a writ of subpœna, duly directed to the National Discount Company, and Abraham Fellerman and Isidor J. Fellerman, individually and as members of the firm of A. Fellerman & Son, thereby commanding them at a certain date and under a certain penalty to personally appear before this Honorable Court, and then and there full, true and perfect answer make to all and singular the premises: and further, to stand to and perform and abide by such further order, direction or decree as to this Honorable Court shall seem meet.

ROBERT VAN IDERSTINE,
Trustee in Bankruptcy of A. Fellerman & Son, Complainant.

JAMES, SCHELL & ELKUS,
Att'ys for Complainant.

Office & P. O. address, 50 Pine Street, Borough of Manhattan, City of New York.

6 EXHIBIT A.

This agreement made this 15th day of August, 1905, between The National Discount Company, doing business in the City of New York, hereinafter designated as Banker, and A. Fellerman & Son, hereinafter designated as Customer, witnesseth:

Whereas, the said Customer is desirous of realizing cash on all accounts created by the sale of the goods ordered and shipped to their customers.

Now, therefore, in consideration of the covenants and agreements to be kept and performed by the respective parties hereto, and of one dollar mutually in hand paid by one party to the other, this agreement witnesseth:

The Banker agrees to secure funds and advance same to the Customer from time to time — per centum of the net face value of such accounts as may be accepted by the Banker upon the following terms and conditions:

First. The Customer may submit all *their* orders to the Bankers for approval of Credit.

Second. The Customer shall deliver to the Banker a correct original and duplicate invoice for goods actually sold and delivered, with original shipping receipt or bills of lading, and an assignment of the account upon the form attached hereto, and made a part of this agreement.

The Banker reserves the right to cancel its approval of any order, or part thereof.

Should the Banker, for good and sufficient reasons, disapprove of an order, the Customer may fill said order, but the account must be assigned as other accounts, and it is to be held as general security for all obligations of the Customer to the Banker, subject to all the conditions contained in this agreement.

7 Third. It is understood and agreed that the Banker in no wise guarantees payment of any account.

Fourth. It is further agreed that the Banker will credit the Customer with all sums of money realized from the collection of accounts and that said accounts transferred and assigned to the Banker as aforesaid, shall be held as general security for any and all advances, claims, debts, dues and demands of the said Customer, due or to become due, or that may hereafter be contracted with the said Banker, with full right and power to said Banker to demand such additional security as the Banker may deem necessary; the said Customer to remain liable to the Banker for any deficiency resulting from said accounts.

Fifth. The Customer authorizes and empowers the Banker to endorse the name of the Customer on any and all checks, vouchers, notes drafts, or other negotiable instruments or commercial paper, which may be payable to the order of the Customer, or endorsed over to the order of the Customer, and received as remittance for accounts assigned and transferred to the Banker as aforesaid; to collect and receive all moneys, to give receipts therefor, and to sue for and collect said accounts in its own name, or in the name of the customer

or otherwise, it being distinctly understood that all and every expense incurred in the collection of accounts is to be charged to and paid by the Customer, with Att'y's Fees.

Sixth. The Customer agrees to pay to the Banker in cash, or allow the Banker, if it so elects, to retain from any moneys collected or received upon the Accounts of the Customer, a commission of five per centum on the gross amount of accounts of the Customer to reimburse the Banker for services rendered or to be rendered in
8 the collection of the accounts, in assisting in extending credit, securing references and reports, and generally to assist the customer with his credit department. The Customer also agrees to reimburse the Banker for such outlays as exchange on checks and postage.

Seventh. The Banker shall further be entitled to charge interest at the rate of six (6) per centum per annum on moneys advanced by it to the said Customer.

Eighth. Should any moneys or any account on which advances have been made by the Banker be collected by the Customer, in whole or in part, all such remittances or collections shall be considered as and be received by the Customer in trust for the Banker, and the identical checks or moneys constituting such remittances shall be immediately handed over to the Banker.

Ninth. The Customer hereby guarantees the correctness and bona fides of all accounts assigned, and the payment of same, and that all merchandise sold, shipped and delivered and constituting such accounts will be packed under personal supervision and legibly marked with the address of the consignee and delivered to common carriers against their receipts or bills of lading, to be forwarded to their respective designations.

Tenth. Should any debtor from whom an account is owing make a general assignment or any transfer of his, her, or its property, or should a judgment be taken against such debtor, or should proceedings in bankruptcy be instituted against such debtor, or should any legal proceeding be instituted against such debtor, or any such debtor become insolvent, as construed by the Bankruptcy Laws of 1898 and 1903, or should any account become due and owing, according to
9 the terms of invoice, and not be paid, then the Customer upon the demand of the Banker, shall pay to the Banker in cash, or allow the Banker if it so elects to deduct from any balance which it may have on hand, or out of any sum which it may thereafter have on hand to the credit of the Customer, any advances made on such account, together with the charges of the Banker, specified in the fifth, sixth and seventh clauses of this agreement.

Should the customer allow any claim or deduction on any account assigned to the Banker, notice thereof must immediately be given by the Customer to the Banker, and thereupon the Customer shall pay in cash, or allow the Banker, if it so elects, to deduct from any balance, which it may have on hand, or out of any sum which it may thereafter have on hand to the credit of the Customer for the claim allowed.

Should any goods be returned to the customer on any account assigned to the Banker, or information received by the Customer of

such return, the Customer must immediately give notice to the Banker, that it shall be optional with the Banker either to retain its title to the merchandise returned or to surrender the same upon receiving payment therefor in cash, or at the further option of the Banker to deduct the value of the goods returned from any balance which it may have on hand to the credit of the customer.

The Customer agrees that any account transferred to the Banker will have this transfer properly entered in his ledger stating that this account is the property of the National Discount Company.

Eleventh. The Banker or its representative shall have the privilege of investigating the bona fides of all accounts upon which advances have been made to the customer.

Twelfth. The Customer agrees not to procure advances on
10 any accounts from any source other than the Banker during the continuance of this agreement.

Thirteenth. This agreement shall be a continuing one, subject to a discontinuance upon thirty days' notice in writing by either party to the other, the Customer, however, reserving the right to discontinue this agreement by settling his account with the Banker in full.

Fourteenth. The foregoing statements, representations and covenants, are made by the Customer for the express purpose of inducing the said Banker to enter into said agreement and to make advances to said Customer on accounts as hereinbefore set forth.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

(Sgd.) A. FELLERMAN & SON.

For value received, do hereby sell, assign, transfer and set over to the National Discount Company, its successors and assigns, the foregoing account, all right, title and interest therein, and all right, title and interest in and to the merchandise constituting the same, and all right, title and interest in and to any of the merchandise therein described that may be returned, and hereby guarantee that said account is just and true, that no payment has been on said account, and that there are no defenses or counterclaims thereto, and that the terms of credit are as specified, and hereby guarantee payment of said account at maturity, and that the account so assigned is a bona fide and correct account of goods actually sold and delivered and accepted.

And hereby constitute and appoint, and by these presents
11 do constitute and appoint the National Discount Company, our true and lawful attorney, irrevocable for us and in our name and stead, but to its own use and benefit, to sell, assign, transfer or set over, demand, compromise or discharge, sue for and collect the foregoing account, giving and granting to the said, The National Discount Company, or its substitute full power and authority to do and perform all and every act and thing whereseoever necessary and proper to be done in the premises, hereby ratifying and confirming all that our said attorney, or its substitutes, shall lawfully do or cause to be done by virtue hereof.

Witness our hand and seal this 15th day of August, 1905.

(Sgd.) A. FELLERMAN & SON.

CITY AND COUNTY OF NEW YORK, *ss:*

Robert Van Iderstine being duly sworn says that he is the complainant in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

ROBERT VAN IDERSTINE.

Sworn to before me this 14th day of May, 1907.
[SEAL.] WENDELL P. BARKER,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

(Endorsed:) United States District Court, Southern District of New York.—Robert Van Iderstine, as Trustee in Bankruptcy of A. Fellerman & Son, Complainant, against The National Discount Company, et al., Defendants.—(Copy.)—Complaint.—James, Schell & Elkus, Attorneys for Complainant, 50 Pine Street, Borough of Manhattan, New York City.—Filed May 23, 1907.

12 District Court of the United States for the Southern District of New York.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidor J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant,
against
THE NATIONAL DISCOUNT COMPANY, a Corporation, Organized under the Laws of the State of Maine, and Abraham Fellerman and Isidor J. Fellerman, Individually and as Copartners, Trading under the Name of A. Fellerman & Son, Defendants.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The National Discount Company, one of the above-named defendants, by Gainsburg & Solomon, its attorneys, answering the complaint of the above-named Complainant, respectfully alleges:

I. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs designated "I," "II," "VII" of the said complaint.

13 II. Admits that on or about the 15th day of August, 1905, the defendants, A. Fellerman & Son, executed a certain agreement with this defendant, wherein and whereby this defendant agreed to advance to them certain sums of money upon account that were then to be transferred to it, but for the terms of which said agreement, this defendant begs leave to refer to the original thereof, with the same force and effect as if the same were herein fully set forth.

III. Admits that it advanced to A. Fellerman & Son certain sums of money upon outstanding accounts, amounting to the gross sum of

$7,727.89, as security for the payment of such advances, and admits that it collected thereon the sum of $5,612.71, but denies each and every allegation not hereinbefore specifically admitted, and set forth in paragraphs "IV," "V" and "VI."

IV. Denies each and every allegation set forth in paragraphs designated "VIII" and "X" in the said complaint contained.

As and for first further, separate and district defense, this answering defendant alleges:

V. That at all the times hereinafter mentioned, this answering defendant was and still is engaged in the private banking business, and the business of discounting accounts and advancing moneys thereon to merchants in and about the City of New York, and elsewhere, and has been so engaged in the said business as a private banker since its incorporation on the 9th day of October, 1903.

VI. That on or about the 10th day of August, 1905, the defendants, Abraham Fellerman and Isidor J. Fellerman, composing the firm of A. Fellerman & Son, entered into negotiations with this defendant, with a view of having it discount all of their firm ac-
14 counts, and making advances thereon, representing to this defendant that they were then in a solvent and sound financial condition.

VII. That thereafter, and on the 15th day of August, 1905, an agreement was made and entered into between this defendant and the said defendants A. Fellerman & Son, wherein and whereby it was, among other things, agreed that said A. Fellerman & Son should assign and transfer and set over all of their firm accounts to this defendant, as security for the repayment to it of any and all sums of money that may be advanced by it to the said A. Fellerman & Son, together with all interest, commissions, charges and other expenses that may be incurred in the collection of said accounts.

VIII. That pursuant to, and under the terms of, said agreement, and upon the regular forms of this defendant and in the regular course of its business, said A. Fellerman & Son transferred, assigned and set over to this defendant certain outstanding accounts aggregating the sum of $7,727.89.

IX. That this defendant, relying upon the representations of the said A. Fellerman & Son as to their then solvent and sound financial condition, and under the terms of the agreement hereinbefore referred to, accepted such assignment and transfer, of the said accounts, and in consideration therefor and simultaneously therewith, advanced to the said A. Fellerman & Son upon the security of the said accounts the sum of $3,000.00 on the 15th day of August, 1905, and the sum of $1,125.00 on the 18th day of August, 1905, respectively.

X. That it was further agreed, among other things, that the defendant should be entitled to charge and to receive the sum of 5% for collection of said accounts, in addition to the 6% interest
15 on the advances made by it, as aforesaid, together with its expenses and other charges, including attorneys' fees that may be incurred in the collection of said accounts.

XI. That the total commission charges of 5 per cent. upon the ac-

counts transferred to this defendant, as aforesaid, amounted to $386.40; that the interest charges on the advances made thereon, amounted to $18.17; that the sundry charges for postage, etc., amounted to $12.09; that the moneys paid out by this defendant for attorneys' fees in the collection of the said accounts, transferred as aforesaid, amounted to $344.77, making a total of commission charges, interest, postage and attorneys' fees of the sum of $761.43.

XII. That this defendant accepted the transfer of the accounts and made the advances thereon as aforesaid, in good faith, in the regular course of its business, and in reliance upon the representations of solvency and sound financial condition made by the said defendant, A. Fellerman & Son, and without any intent on its part to hinder, delay or defraud creditors.

XIII. That the defendant made the advances as aforesaid in good faith, for a present fair consideration and not in contemplation of, or in fraud upon the Bankruptcy Act and the laws amendatory thereof, or any other statute in such cases made and provided, and without intent on its part to hinder, delay or defraud the creditors of said A. Fellerman & Son, and without any knowledge on the part of this defendant that such advances were obtained by said A. Fellerman & Son at a time when they were insolvent, or in contemplation of, or in fraud upon the Bankruptcy Act and the amendments thereto, or that the moneys given by it were obtained by said A. Fellerman & Son with intent to hinder, delay or defraud their creditors.

16 As and for a second further, separate and distinct defence, this answering defendant alleges:

XIV. That on or about the 19th day of August, 1905, an involuntary petition in bankruptcy was filed against the said A. Fellerman & Son, in the office of the Clerk of the United States District Court for the Southern District of New York, wherein the complainant herein was appointed Receiver of the estate of said A. Fellerman & Son, who duly qualified and entered upon the discharge of his duties as such Receiver.

XV. That thereafter this defendant made and delivered to the complainant herein, then acting as Receiver, a full, complete and true account of its entire transactions with the firm of A. Fellerman & Son, of the accounts transferred to it as security for the moneys advanced thereon, of all of its charges for such advances, and of the moneys paid out by it for attorneys' fees, and of the surplus moneys remaining in its hands over and above such advances, commissions, charges, interest, expenses and attorneys' fees.

XVI. That subsequently and on or about the 19th day of February, 1907, this defendant, at the request of the complainant herein, then acting as Receiver of the estate of A. Fellerman & Son, paid to him the sum of $767.33, being the surplus moneys in its hands, as aforesaid.

XVII. Upon information and belief, that the said complainant herein, then acting as Receiver in bankruptcy of the estate of A. Fellerman & Son, was thereafter duly elected Trustee in Bankruptcy of the said estate, and duly qualified and entered upon the discharge of his duties as such Trustee.

XVIII. That the said sum of $767.33 paid to the said Complainant then acting as Receiver in Bankruptcy of the estate of A.
17 Fellerman & Son, was received and accepted by him as the surplus of moneys collected by this defendant over and above all of its advances and charges as aforesaid, and as the balance due from this defendant to said A. Fellerman & Son.

XIX. That the complainant herein acting as such Receiver in Bankruptcy of the estate of A. Fellerman & Son accepted and received said moneys with full knowledge of all of the foregoing facts and the transactions hereinbefore referred to, fully ratifying and approving the same, and accepted said surplus moneys in full satisfaction and payment of any and all claims against this defendant of whatsoever kind or nature arising out of such agreement or transaction entered into and had between this defendant and the defendants A. Fellerman & Son.

XX. The defendant further alleges that the complainant herein then acting as Receiver in Bankruptcy of the estate of A. Fellerman & Son accepted the said moneys as aforesaid, releasing and discharging this defendant from any and all claims and liabilities of whatsoever kind against this defendant, as set forth in the complaint herein.

Wherefore this answering defendant demands judgment dismissing the complaint of the complainant herein with costs.

GAINSBURG & SOLOMON,
Attorneys for Defendant, The National Discount Company, 299 Broadway, Manhattan, New York City.

J. GAINSBURG,
Of Counsel.

18 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Benno Levison, Jr., being duly sworn, deposes and says that he is the President and an officer of the National Discount Company, the corporation defendant in the within action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

That the reason this verification is not made by the defendant, is because it is a corporation; and the ground of deponent's belief as to all the matters contained in said answer is from information acquired by deponent in the course of his duties as an officer of the said corporation.

BENNO LEVISON, JR.

Sworn to before me this 24th day of June, 1907.
[SEAL.]
JULIUS LEWIS,
Notary Public, N. Y. Co.

(Endorsed:) United States District Court, Southern District of N. Y.—Robert Van Iderstein, as Trustee, etc., Plaintiff, against The National Discount Co., etc., et al., Defendant.—Copy.—Answer.—

Gainsburg & Solomon, Attorneys for Def't, National Disco. Company, Barclay Building, 299 Broadway, Borough of Manhattan, New York City.—Filed June 28/07, 11 a. m.

19 United States District Court, Southern District of New York.

ROBERT VAN IDERSTINE, as Trustee, Complainant,
against
THE NATIONAL DISCOUNT COMPANY et al., Defendants.

The complainant herein as a replication to the matter set forth in the answer of the National Discount Company, alleges:

The repliant, saving and reserving to himself any and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, The National Discount Company, for replication thereto, saith, that he doth and will aver, maintain and prove his said Bill to be true, certain and sufficient in law to be answered unto by the said defendant, and that the answer of the said defendant, The National Discount Company, is very uncertain, evasive and insufficient in law to be replied to by this repliant, without that, that any other matter or thing in the said answer contained, material, or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true, and this repliant avers that any and all money received by the Receiver in Bankruptcy from The National Discount Company was by agreement of the said defendant National Discount Company and the complainant, taken and received without
20 prejudice to any right of suit and was not received in settlement or satisfaction of any rights of action which the complainant did have against the defendant; all of which matters and thing this repliant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by his said Bill he hath already prayed.

JAMES, SCHELL & ELKUS,
Solicitors for Complainant.

Office and Post Office Address, 170 Broadway, Borough of Manhattan, City of New York.

To Isidor Gainsburg, Solicitor for the National Discount Company, 299 Broadway, Manhattan, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Robert Van Iderstine, being duly sworn, says that he is complainant in this action; that he has read the foregoing replication and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

ROBERT VAN IDERSTINE.

Sworn to before me this 31 day of M'ch, 1908.
MAUDE V. BENTON,
Commissioner of Deeds, City of New York.

(Endorsed:) United States Dist. Court, Southern Dist. of New York.—Robert Van Iderstine, as Trustee, Complainant, against The National Discount Co. et al., Defendants.—(Copy) Replication.—James, Schell & Elkus, Attorneys for Complainant, 170 Broadway, Borough of Manhattan, New York City.—Filed April 1, 1908.

21 NEW YORK, 8 *December*, 1908.

Appearances:

Messrs. James, Schell & Elkus (Mr. Elkus, Mr. Levis and Mr. Rosenburg) for the plaintiff;

Messrs. Gainsburg & Solomon (Mr. Gainsburg and Mr. Charles W. Fuller) for the defendant.

The jury being impanelled and sworn, counsel for the plaintiff opens the case to Court and jury.

Mr. LEVIS: I offer in evidence the involuntary petition in bankruptcy, filed in this Court August 19, 1905, at 1.05 in the afternoon.

It is marked Plaintiff's Exhibit 1.

Mr. Levis states the contents of Exhibit 1 to the jury.

Mr. GAINSBURG: I reserve the right to move to strike out this testimony, in the event that it is not connected with the defendant, as immaterial in this case.

Mr. LEVIS: I offer in evidence the subpœna issued on this petition, together with proof of service upon William Fellerman, by the United States Marshal.

It is marked Plaintiff's Exhibit 2.

Mr. Levis states the contents of Exhibit 2 to the jury.

Mr. LEVIS: I offer in evidence the order filed on the 21st day of September, 1905, adjudging William Fellerman and Isidor J. Fellerman individually and composing the partnership of A. Fellerman & Son, bankrupts.

It is marked Plaintiff's Exhibit 3.

Mr. Levis states the contents of Exhibit 3 to the jury.

22 Mr. LEVIS: I offer in evidence the order dated 19 August, 1905, and filed the 21st of August, 1905, appointing Robert van Iderstine receiver in bankruptcy of the firm and the individual members; also the consent annexed to that order of Leonard Bronner, attorney for A. Fellerman & Son.

It is marked Plaintiff's Exhibit 4.

Mr. Levis states the contents of Exhibit 4 to the jury.

Mr. LEVIS: I offer in evidence the order appointing Robert van Iderstine trustee in bankruptcy.

It is marked Plaintiff's Exhibit 5.

Mr. Levis states the contents of Exhibit 5 to the jury.

Mr. LEVIS: I also offer in evidence the order of the referee approving his bond.

It is marked Plaintiff's Exhibit 6.

Mr. Levis states the contents of Exhibit 6 to the jury.

Testimony for the Plaintiff.

ROBERT VAN IDERSTINE, being duly sworn and examined as a witness on his own behalf, testifies:

By Mr. LEVIS:

Q. What is your profession?
A. I am a lawyer.
Q. How long have you practiced law?
A. Twelve or thirteen years.
Q. You are an admitted practitioner before the bar of this state?
A. Yes.
Q. You are the trustee in bankruptcy in this case?
A. Yes.
Q. Were you also the receiver?
A. I was.
23 Q. For how long a period have you acted both as receiver and trustee of this estate, approximately?
A. About three years; a little more than three years.
Q. At the time of your appointment, on August 19, 1905, or thereabouts, did you go to the place of business of A. Fellerman & Son?
A. I did.
Q. Can you tell me what day it was you went there?
A. My best recollection is that it was Monday morning.
Q. At the time you went there were you accompanied by anyone?
A. I think I was accompanied by one of the members of the firm of Stern, Singer & Barr.
Q. Who became your attorneys in this matter?
A. Who became our attorneys in this matter.
Q. What did you do when you got to the place of business of A. Fellerman & Son?
A. I first saw the keeper who had been in charge for a day or two prior to my coming; I then made an examination of the premises.
Q. Do you know who that keeper was?
A. He was a brother of one of the members of the firm of Stern, Singer & Barr.
Q. Mr. William E. Stern, was he?
A. Mr. William E. Stern.
Q. Do you know how he happened to be there?
A. I was away on Saturday, the day of my appointment, and Mr. Stern was placed in charge pending my arrival.
Q. You found him there at any rate on the 21st, when you got there?
A. I did.
Q. Did you look over the stock at that time?
A. I didn't so much look over the stock as I did make an effort to find the books of the firm and the papers and records of the firm.
Q. Did you find the books?

Objected to as immaterial, irrelevant and incompetent, and not binding on the defendant in any issues here, unless his Honor takes it subject to being connected with the defendant.

24 The COURT: He is entitled to show the condition of the concern there; of course, the defendant may not have known about it.

Mr. GAINSBURG: Then it is taken subject to my motion?

The COURT: Yes.

A. I did not.

Q. Will you state just what you did with reference to the books there?

A. I made a thorough examination of the portion of the loft which was used as an office, of the safe, of the desks, including the book-keeper's desk, and, following that, of the whole loft, going into every article of furniture or place where I could conceive that books, records or papers might be kept; all in an effort to discover some records of the concern; but I found none at all, except some old memoranda, a few fire insurance policies and some routine correspondence and copies of letters.

Mr. GAINSBURG: I made the formal objection and move to strike out the testimony of this witness as incompetent, irrelevant and immaterial and not binding.

Motion denied. Exception.

Q. Who did you leave in charge of the place when you left there?

A. William E. Stern.

Q. Mr. van Iderstine, have you at any time since, either as receiver or trustee, obtained possession of the books of A. Fellerman & Son?

Same objection, as incompetent, irrelevant and immaterial and not binding on the defendant.

Objection overruled. Exception.

A. I have not.

Q. Did you later offer all the assets and merchandise of A. Fellerman & Son which came into your hands, for sale?

A. I offered all the merchandise, machinery and physical property for sale.

25 Q. Was that by order of this Court?

A. By order of this Court, by the auctioneer of the Court, Shongood.

Q. It was by the United States Auctioneer?

A. By the United States Auctioneer.

Q. Was the property appraised before it was sold?

A. It was.

Mr. LEWIS: I offer in evidence the appraisal filed in this Court.

Mr. GAINSBURG: I do not object to it as incompetent; I merely object so as to reserve my rights later to strike out the testimony, if it is not connected with the defendant herein.

The appraisal is marked Plaintiff's Exhibit 7.

Mr. LEWIS: The appraisal on the front sheet contains the oath of William E. Stern, Frederick W. Pollock and Edmund Kelly that they would truly appraise the property of this bankrupt firm.

The total amount of their appraisal amounted to $7,476.41. In that amount they have themselves noted that there is $1,600 worth of goods which belonged to the American Woolen Company, Tannenbaum and Benjamin J. W. Goddard & Sons, so that the total amount of their appraisal of property belonging to the bankrupt is $5,824.99. That includes both the merchandise and the fixtures. It includes all the property; the papers were filed 31 October, 1905.

Mr. Levis offers in evidence the order of this Court appointing the appraisers under date of August 23, 1905.

It is marked Plaintiff's Exhibit 8.

Mr. Levis states the contents of Exhibit 8 to the jury.

Q. Will you tell me how much was realized at that sale; how much you received from the sale of the merchandise, the fix-
26 tures, and all the property which you have testified was offered for sale by you as receiver?

Same objection, ruling and exception.

A. I cannot give the total amount received at the sale; I can only give the amount which was paid to me by the auctioneer, which was less the expenses of the sale, the commission of the auctioneer, etc. I think also that some goods were withdrawn on the day of the sale, being claimed by other parties; the title to those was tried out afterwards.

Q. How much did you receive from the United States Auctioneer?

A. $4,903 and some cents, I think.

Q. Your report states that you received $4,903.81; is that correct?

A. That is correct.

Q. What other moneys have you received both while you were receiver and while you were trustee; I want the entire amount you have received as receiver and trustee; the gross sum?

A. I received an amount in settlement of a judgment I recovered against Charles Stich——

Q. Not the details, but give me the total amount at the present time; perhaps I can refresh your recollection from your report as receiver?

Counsel produces report to the witness, who examines it.

A. I have received other amounts since then; $9,216 is. I think, the total amount; I have made a memorandum from my books; if I could refer to that I could refresh my recollection. That includes the $4,000—$9,126.88 is the total amount; that includes everything except perhaps some more interest, due from the Manhattan Trust Company within the last six months or a year.

Q. Have any of those sums been secured from actions instituted by you?

Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception.

27 The COURT: He may show briefly what the tota- was.

A. Yes; several actions were brought; one amount included in this total was $2,000 recovered from Charles Stich in settlement of a judgment obtained against him; I also settled with E. B. Schiller after an action was brought against him to recover money. My settlement with him was $200. I also—I am speaking now from my best recollection; I am not entirely positive—recovered about $500 from Gordon in an action instituted against him. The rest of the money, after deducting $4,903 received from the United States Auctioneer and these sums to which I have testified, consist- of a few small accounts which came into me after I was appointed receiver.

Q. So that you received $2,700 from actions instituted after you became trustee?

A. Yes.

Q. Can you tell me what the total money that you have had that was subject to disbursements of creditors—how much that amounted to; that is, I want the amount of your expenses, so that the jury may understand how much this estate has been?

A. I can't give you the total expenses.

Q. Can you give me your best recollection of what the figures would be?

A. I am afraid my recollection would not be sufficiently accurate to make it worth while; I can testify later on that subject.

The COURT: Tell him what you want, and he can get the facts, and you can call him again.

Q. Among the assets which you have mentioned, is there any money included from the National Discount Company?

A. I think so; I think there are several hundred dollars.

Q. Will you give to the jury the amount of money you received from the National Discount Company?

A. My receipts from that company was in connection with the Gordon claim——

Q. I want just the amount?

A. $767.33.

Q. Will you tell me about when you received that?

28 A. February 21, 1907 (referring to memorandum).

Q. You know nothing about the conditions under which this check was obtained; you received it from your attorneys, did you not?

A. I received it from my attorneys, $767.33.

Q. And the circumstances surrounding the receipt of that check you didn't arrange in any way, did you?

A. I did not.

Cross-examined by Mr. GAINSBURG:

Q. Did you, during the period of time that you were receiver and thereafter, and while you acted as trustee, ever receive account-

ings from the National Discount Company of the disposition of the accounts that were transferred to them by A. Fellerman & Son, either orally or otherwise?

A. I did not do so personally; I cannot recall at the moment whether my attorneys did or did not.

Q. Did you at any time request your attorneys so to do?

A. I do not recall that I did.

Q. Did your attorneys at any time during that period of your administration up to the present day, show you any accounts that were rendered them by the National Discount Company with reference to the transactions of A. Fellerman & Son?

A. I have no recollection on that point; I know that the matter of the National Discount Company was discussed at considerable length in February, 1907, or just prior thereto, when the payment to which I have testified was made; but as to the details of those conversations I have absolutely no recollection.

Q. When were you appointed receiver?

A. In August, 1905.

Q. Did you not immediately thereafter notify the National Discount Company by service upon them of an order appointing you receiver, of that fact?

A. I take it so.

Q. And did you not subsequently receive various statements of accounts from that Company?

A. I think not.

29 Q. Weren't there some accounts which that Company did not collect, transfer and assign to you?

A. I recollect no statement from that Company.

Q. Isn't it a fact that when the Company sent you a check for $767.33 that there was a portion of the equities in their hands over and above the advances that they had made to A. Fellerman & Son upon the accounts assigned to them?

A. I could not say at that time what it was.

Q. And isn't it also a fact that at that time there was still a balance of about $1,500 of uncollected accounts that were transferred to you?

A. There was not.

Q. You didn't have charge of that transaction?

A. I did not.

Q. Did you at any time ever see, from 1905 to date, any of the accounts rendered by the National Discount Company to James, Schell & Elkus?

A. I do not think so.

Q. (Handing witness papers.) I show you a number of these accounts so rendered, and ask you if by looking at them, your recollection will be refreshed as to whether or not you have ever seen them.

Mr. LEVIS: Those are copies, aren't they?

Mr. GAINSBURG: They are copies, of course; there is a notice served upon you to produce. October 12, 1908, copy received from

James, Schell & Elkus, Notice to Produce. I asked for the production of those accounts at the trial of this case.

Q. Did Messrs. James, Schell & Elkus ever show you a letter from the National Discount Company, showing what surplus they had on hand, what balance in moneys, and what balance of accounts they still had on hand uncollected on that date?

Objected to on the ground that the question contains something that is not in evidence.

Question withdrawn.

Q. Did James, Schell & Elkus ever show you a letter dated February 27, 1906, from the National Discount Company, ad-
30 dressed to them, concerning this matter?

A. I have no recollection of such a letter.

Mr. GAINSBURG: I ask for the letter of February 27, 1906.

The COURT: If you have got a number of letters, put your question about all of them; if they are all alike.

Mr. GAINSBURG: I call for the letter of March 2nd, 1908, as well as that of February 27, 1906.

They are produced.

Mr. Gainsburg hands letters to Mr. Elkus.

Mr. ELKUS: There is no objection to the letter of March 2nd, 1908; it is immaterial.

The letters above referred to are offered in evidence.

Objected to.

Mr. GAINSBURG: This action was commenced on May 14.

The letter of February 27, 1906, is received and marked Defendant's Exhibit A.

The letter is read to the jury.

Q. Was that letter ever shown to you?

A. I think not.

Q. And if Messrs. James, Schell & Elkus received accounts of the condition of A. Fellerman, you don't remember ever seeing them, do you?

A. I do not.

Q. Do you recall whether you received this check, dated February 19, 1907, which I offer in evidence?

A. I did receive it.

The check is objected to as immaterial and irrelevant. Objection overruled. Exception.

The check, being for $767.33, is marked Defendant's Exhibit B.

Q. Did you receive it by mail, or do you recall that it was handed to you by your attorneys, Messrs. James, Schell &
31 Elkus?

A. I believe it was received by me from Messrs. James Schell & Elkus.

Q. Was there attached to this check at that time, if you recall, a statement of the accounts of A. Fellerman & Son?

A. I think not.

Q. If such a statement was sent you don't know whether James, Schell & Elkus ever received it, do you?

A. I do not.

Q. It was never shown to you?

A. I have no recollection on that subject.

Q. Do you know how this amount of $767.33 came to be determined?

A. I did know at the time; I do not know now.

Q. How did you know it at that time?

A. I knew, because I received the check after consultation with my attorneys, going into the facts of the case at that time.

Q. Did you know at that time that this was the balance of moneys—the equity of the moneys in the hands of the National Discount Company over and above the advances which they made upon these accounts to A. Fellerman & Sons?

A. I cannot say; I do not recall now.

Q. Did you make any record of how you came to receive this check at the time you received it?

A. I did.

Q. Have you that record with you?

A. I have not.

Q. Can you bring it with you?

A. I think so.

Q. Will you please do so?

A. I will.

Q. In going over this matter with your attorneys, did you not examine with them accounts that were rendered by the National Discount Company?

A. I did not.

Q. As far as you know, there never was any account rendered by the National Discount Company submitted to you, or examined by you?

A. That is true.

32 By the SIXTH JUROR:

Q. I understand that some of them you had to sue; was this one of the firms that you had to sue to get this money?

A. No; we are suing them now.

Counsel moves to strike out the latter part of the answer. It is stricken out.

By Mr. GAINSBURGH:

Q. I understand that there were some of the parties you have sued to get this money. Did you sue the National Discount Company for these moneys of $767.33?

A. No.

Q. The suit that you brought that counsel spoke to you about was an action against a Mr. Gordon; is that right?

A. Yes.

Q. He claimed to be entitled to a portion of this $700, and subsequently you obtained an order from this Court showing that Mr.

Gordon had withdrawn his claim, and the National Discount Company paid it to you; is that right?

A. I believe so.

Q. But the National Discount Company, so far as you know, never made any objections to pay it, provided you succeeded in defeating the assignment or claim made by Mr. Gordon?

A. So far as I know, that is true.

Q. The fact is that the National Discount Company held this money; you and another person, Mr. Gordon, claimed the money; the National Discount Company was willing for judgment to fall to either one of you gentlemen, but didn't want to pay it twice; you succeeded in getting an order of the Court directing Gordon to withdraw his claim, and he consented, and then the National Discount Company paid you the money; is that right?

A. You have included in your question a number of facts that don't come within my personal knowledge.

Q. Well, let me see if I can refresh your recollection about an order of James, Schell & Elkus——

33 The COURT: Mr. Van Iderstine says he didn't carry on these negotiations, so you had better examine the counsel who did.

Mr. LEVIS: I will answer anything you want.

By Mr. GAINSBURG:

Q. Do you mean to say that you did not have anything to do with this transaction by which you received this seven hundred dollars?

A. I had absolutely nothing to do with the negotiations with the National Discount Company, or with their attorneys.

Q. So that you don't know, of your own knowledge, how this claim of Mr. Gordon's against this fund was withdrawn?

A. I do not; the matter was placed before me for decision and determination prior to the acceptance of the check; the payment of the check; at that time I approved whatever the report was that was made to me by my attorneys.

Q. You say the matter was placed before you for decision and determination; do you refer as to whether or not you received this check from the National Discount Company?

A. The whole matter of the National Discount Company and Gordon was discussed by me with my attorneys at about the time of the acceptance of the check.

Q. There was no refusal on your part to accept the check of the National Discount Company?

A. Prior to the time to which I refer, the negotiations had been entirely conducted by James, Schell & Elkus.

Q. And at that time when you were present, and James, Schell & Elkus reported to you the negotiations, you did not refuse to accept that check?

A. I cannot recall the particular conversation that I had with James, Schell & Elkus at that time; I have no recollection of re-

fusing to accept the check; I went over the matter upon different occasions several times with Mr. Rosenberg.

Q. And you don't recollect bringing any suit against the
34 National Discount Company for this check?

A. I do not.

Q. Nor do you recall bringing any action of any kind against the National Discount Company for the $1,500 worth of accounts that were at the same time turned over to you?

A. The only account which I recall against that Company is the present account.

Q. And that, of course, excludes any other account from your memory; that is all?

No answer.

Redirect examination by Mr. LEVIS:

Q. You have been asked with reference to your receipt of this check; I am going to show you a letter signed by yourself, and ask you whether that will refresh your recollection (producing letter to witness)?

A. That does refresh my recollection.

Q. Now will you tell the jury under what conditions you received that check?

A. I received that check on the condition of the payment of $500 to be made to Samuel Gordon, who had made a claim against that fund.

Mr. GAINSBURG: I move to strike out the answer as immaterial.

Motion denied. Exception.

Q. From whom did you receive the check itself; does that letter, written to James, Schell & Elkus, refresh your recollection as to this conversation you had with James, Schell & Elkus at the time with reference to the conditions under which the check was received?

A. I couldn't state it in detail any more——

Mr. GAINSBURG: I object to the conversation had with James, Schell & Elkus.

Mr. LEVIS: You asked that yourself.

Objection overruled. Exception.

35 Q. I refer you specially to this portion of your letter——

Mr. GAINSBURG: Offer the letter in evidence.

The letter is offered in evidence.

The letter is marked Plaintiff's Exhibit 9.

Q. I call your attention specifically to this portion of the letter, Plaintiff's Exhibit 9:

"I am in receipt of your favor of the 19th instant, enclosing check of the National Discount Company for $767.33; I have noted your comments on the same and that you will make a demand for a full accounting from the National Discount Company."

Does that refresh your recollection as to whether you didn't have a conversation with James, Schell & Elkus, or with Mr. Rosenberg

and myself of that firm, in which further steps were taken with reference to this account?

A. My best recollection is that our conversation as to the check was based upon the theory that further steps would be taken against the Company and an accounting demanded, and if necessary, an action brought.

Q. And that was the conversation at that time?

A. Yes.

Recross-examination by Mr. GAINSBURG:

Q. You know that thereafter Messrs. James, Schell & Elkus asked the National Discount Company for a statement of account of the condition of A. Fellerman & Son, and do you know that pursuant to that request they rendered such account, and allowed Messrs. James, Schell & Elkus to examine the books of account?

A. I do not know either of those facts, from my own knowledge.

Q. (Producing letter to witness.) I show you this letter dated February 28, 1906, and ask you to state if you were acquainted with its contents at the time Messrs. James, Schell & Elkus wrote
36 them, or the subject matter concerning it, which was written?

A. I think that is directly in line with the conversation that I had.

Q. I show you this other letter of November 28, 1906?

A. I think that is in line with our conversation.

Q. Do you know that on March 29, 1907, such an examination was had by your firm of the books as well as of Mr. Levison at the office of the National Discount Company with reference to these transactions?

A. I do not know that.

Mr. ELKUS: We will concede that an examination of the books with Mr. Levison was had.

The WITNESS: My knowledge, you understand, is due to conversations with Mr. Rosenberg.

Q. Was it Mr. Rosenberg or Mr. Levis that you had these conversations with?

A. Generally with Mr. Rosenberg; I think Mr. Levis was entirely familiar with the matter.

Mr. GAINSBURG: I offer in evidence the letter of February 28, 1906.

It is marked Defendant's Exhibit C.

Mr. GAINSBURG: I offer in evidence letter of November 28, 1906.

It is marked Defendant's Exhibit D.

Mr. GAINSBURG: I offer in evidence letter of February 26, 1906.

It is marked Defendant's Exhibit E.

Mr. GAINSBURG: I ask for the production of a statement dated November 30, 1906, rendered by the National Discount Company of the account of A. Fellerman & Son, and addressed to James, Schell & Elkus.

Mr. Gainsburg reads Exhibits C, D, and E to the jury.

The statement just called for by Mr. Gainsburg is produced and read to the jury.

It is offered in evidence.

It is marked Defendant's Exhibit F.

37 Q. Do you know whether or not pursuant to the request of James, Schell & Elkus letter dated November 26, 1906—February 26, 1906, there was turned over to them the collateral notes and assignment of A. Fellerman & Son, the check of the Pacific Bank, the cash receipt signed by A. Fellerman & Son?

A. I do not know.

Mr. LEVIS: I call for the production of a letter of February 19, 1907.

Mr. GAINSBURG: I have not it here, but you have a copy of it.

Mr. LEVIS: Then I will take the stand myself, and give secondary evidence.

Mr. GAINSBURG: A notice to produce was served.

Mr. ELKUS: We admit that a notice to produce was served.

ROBERT P. LEVIS, being duly sworn and examined as a witness on behalf of the plaintiff, testifies:

Mr. ELKUS: It is conceded, as I understand, that you received a notice requiring you to produce a letter written by James, Schell & Elkus to the National Discount Company, dated February 19, 1907.

Mr. GAINSBURG: It is conceded that we received a notice to produce particularly, a letter directed to the National Discount Company acknowledging the receipt of a check for $767.33.

By Mr. ELKUS:

Q. You are an attorney at law?

A. I am.

Q. Connected with the firm of James, Schell & Elkus?

A. I am.

Q. And were in the year 1907?

A. Yes.

Q. Are you familiar with the circumstances under which the check which has been put in evidence, dated February 19, 1907, which has been marked Defendant's Exhibit B of this date, was received by Mr. Van Iderstine from the National Discount Company?

A. I am, sir.

38 Q. At that time did you write and cause to be sent to the National Discount Company a letter acknowledging the receipt of the check?

A. I did, on the day on which the check was received; it was received on the 19th.

Q. Where was the letter mailed?

A. The letter was mailed from 346 Broadway, to the National Discount Company.

Q. Where was their office at that time?

A. That was about 370 Broadway, I think.

Q. Was a copy of that letter kept?

A. There was, sir.
Q. When did you last see the copy; was it a carbon copy?
A. It was a carbon copy of that letter; I had it—this case was prepared for trial in February of this year, but wasn't reached; at that time I had that letter in my possession.
Q. You mean a copy?
A. I mean a copy of the letter, yes.
Q. Have you made a search for the copy since?
A. I have made every search for the copy since.
Q. Have you been able to find it?
A. I have not been able to find it.
Q. Do you remember the contents of the letter?
A. I do.
Q. Will you please state your recollection of the contents?
A. I myself dictated the letter, and it was signed by me.
Q. State to the jury the contents of the letter.
A. The letter acknowledged, under date of the 19th, acknowledged the receipt of a check for $767.33, and then stated that the money was received without prejudice to any rights which the trustee might have in an action to recover any other moneys; that was part of this transaction.

Cross-examined by Mr. GAINSBURG:

Q. You say that you remember distinctly?
A. I remember it very distinctly.
Q. You have mislaid the copy, and it seems just so that the
39 Discount Company have mislaid their original?
A. I can even account for what became of the mislaid copy; it was in my overcoat which I abandoned when I moved, and that coat was given to the mover, and I even have tried to find it from the mover; and that was what caused the loss of the letter.
Q. Did you receive statements of accounts from the National Discount Company between 1906 and 1908?
A. Yes, sir.
Q. Statements with reference to A. Fellerman & Son?
A. Yes.
Q. Showing what accounts were collected——

Mr. ELKUS: We will produce the accounts.

Q. Do you know the signature of James, Schell & Elkus?
A. Yes, sir.

Mr. GAINSBURG (reading from paper): "December 3, 1906, Received of the National Discount Company, statement of A. Fellerman & Son——"
Mr. GAINSBURG: I call for the statement.
Mr. ELKUS: You have that one; that was under date of November 30; there is a further one in March, 1906——
Mr. GAINSBURG: Will you kindly produce all the statements that you have had from the National Discount Company, and that will save a lot of trouble.

The witness leaves the stand to produce the statements called for. They are produced.

Q. All these statements which you have produced with reference to the account of A. Fellerman & Son sent to you by the National Discount Company at your request showing what accounts were collected, what accounts were outstanding and what equity, if any, they had in their accounts?

A. Either sent to me or described by somebody in the office; they were all received from the National Discount Company.

Q. Between 1905 and March, 1907?

40 A. No, some of them—yes, the last lot that you have was obtained in March, 1907; all were obtained between those times.

Q. Were you present when the books of the Company were examined by one of your firm, or was it Mr. Rosenberg?

A. It is my best recollection that I personally examined those books; yes, sir.

Q. At the office of the National Discount Company?

A. Yes, sir; I went there.

Q. And do you know that in addition to your personal examination of these books at their office Mr. Rosenberg also examined the books?

A. I think that is incorrect; you have asked me for my recollection, and my recollection is that he did not, and that I had the first examination of those books.

Q. And who had the second examination?

A. I think there was no second, unless you mean there was a subsequent examination under oath of Mr. Levison, taken down; at that time Mr. Levison had in his possession the books of account.

Q. You did not conduct that examination?

A. No, sir.

Q. Mr. Rosenberg conducted that?

A. Yes.

Q. And at that time do you know whether those books were again gone over by Mr. Rosenberg?

A. I assume that you had better ask the man who did it.

Q. Do you know anything with reference to the transfer of the balance of uncollected accounts?

A. Yes, sir.

Q. Were they transferred at the same time that the check was sent and accepted by your client?

A. I think not; my recollection is that after the check had been sent and that letter sent I called either Mr. Levison or Mr. Debolt on the phone and asked them for the balance of accounts, in view of the fact that every claim they could possibly make was paid; I am positive that either one of those two I spoke to; and I think you will find that they then agreed to execute such an instrument;

41 that was six or seven days after the check was received, I think; that is my recollection.

Q. They sent you a list with these accounts, and I have a mem-

orandum here: "Sent to James, Schell & Elkus, February 26, 1907," which was six days after the transfer?

A. Yes, sir.

Q. And pursuant to your request that was done?

A. Yes.

Q. And you are now, or have been, collecting these accounts, or attempting to collect them for the trustee?

A. We have made attempts to collect those accounts; yes, sir.

Q. Were these part of the accounts originally assigned by Fellerman & Son to the National Discount Company?

A. I think you had better ask the assignor that question; I can give you my impression.

Q. We want facts; do you know—if you don't know, say so?

A. I assume that those were part of the original accounts, but no money was collected.

Q. My question was whether those were part of the accounts?

A. My impression and my investigations would lead me to conclude that they were part of the original accounts assigned.

Q. And the $766 check; was that also realized from the original accounts assigned to the National Discount Company?

A. It was stated, as a matter of conversation between some of the parties and myself, that that was an amount over and above what had been advanced.

Q. By the National Discount Company to A. Fellerman & Son?

A. Yes, sir.

Q. And you had no occasion to doubt that statement?

A. I had a very serious occasion to doubt the amount tendered as being the entire amount.

Q. That is not the question?

A. I don't know what your question is.

Q. The question is, did you doubt the statement made at the time when you had a conversation with some of the parties
42 interested here that this $767.33 was realized from the collection of the accounts assigned to the National Discount Company?

A. I can't answer that question, I know that they were not the direct moneys received; I know it was a check of Mr. Levison's; and my understanding would be that it was what Mr. Levison tendered as a balance; I declined to receive it as a balance.

Q. My question is not that or in what form you received it; my question is whether you doubted the statement made to you at the time the check was tendered, that these moneys were part of the moneys collected by the National Discount Company upon the accounts assigned by A. Fellerman & Son; did you doubt that statement?

A. I didn't doubt that it was part of the moneys; no, sir.

Redirect examination by Mr. ELKUS:

Q. In acting for the trustee and taking these amounts of accounts that had not been collected by the National Discount Company, was

anything said with reference to your receiving them without prejudice or with regard to a suit being brought?

Counsel has already given us the contents of a letter which clearly defined his position.

It is conceded that the check and the accounts were received without prejudice to any action to be brought.

Mr. GAINSBURG: In accordance with his testimony given here, it is conceded that Mr. Levis will testify to the same effect with reference to the accounts received from the National Discount Company.

Q. You were asked whether this sum which is represented by the check of February 19 was the correct sum which remained after the National Discount Company had reimbursed itself for all the moneys advanced, and you said it was not; did I understand you correctly?

43 Objected to on the ground that that question was not asked; the answer was given, but the question was not put as to whether it was a correct sum. Objection sustained. Exception.

By Mr. GAINSBURG:

Q. Do you know what the total accounts aggregated, when turned over to James, Schell & Elkus, to the trustee?

A. It is my best recollection that that was approximately $1,700; I would rather refresh myself from the paper, if you will give it to me.

Mr. GAINSBURG: That is enough; it was about $1,800.

ABRAHAM FELLERMAN, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. LEVIS:

Q. How old are you?
A. Fifty-nine.
Q. What business were you engaged in before August, 1905?
A. The cloak and suit business.
Q. What was the name of that business?
A. A. Fellerman & Son.
Q. Who composed that firm?
A. I did.
Q. Who was with you; who was your partner?
A. My son.
Q. What was your son's name?
A. Isador Fellerman.
Q. How long had you been in business at that particular place?
A. In that particular business?
Q. Yes, in the cloak and suit business?
A. Fifteen or sixteen years.
Q. Where was that place of business?
A. In 7 East 17th Street.
Q. How long had you been in business at that particular place?

A. About three years; two years and six months.
Q. Where were you born?
A. In Germany.
Q. How long have you been in this country?
A. About 39 years.
44 Q. Who had charge in this business of the merchandise and factory and stock?
A. One of my daughters.
Q. I don't mean the books; I mean the merchandise; the stock room; who had charge of the manufacturing of the business?
A. Myself.
Q. Did your son take general charge of the books?
A. No; he just used to be outside man.
Q. Who kept the books of the business?
A. My daughter.
Q. Is your daughter that kept the books here in the room?
—. ——.
Q. What is her name?
A. Bella Fellerman.
Q. Do you remember when you began dealing with the National Discount Company; what day it was?
A. I don't remember exactly the date now; it is nearly four years ago; if I see it I will remember.

Mr. LEVIS: I call for the production of the contract.
It is produced.

Q. Is that your signature?
A. Yes, sir.
Q. Did you sign that paper; where did you sign it?
A. I really cannot remember whether it was in the store or in Mr. Levison's office; I can't remember positive whether it was in my house or Mr. Levison's office; I signed it, but I don't remember where now; it was in the store on in Mr. Levison's office; I think it must have been in his office.
Q. When I call your attention to the fact that this agreement states that it was August 15, 1905, that it was made, does that refresh your recollection as to the time you began dealing with the National Discount Company?
A. Yes, sir.
Q. Then the date was the 15th of August, 1905?
A. Yes sir.

The agreement is offered in evidence. It is marked Plaintiff's Exhibit 10.
Mr. Levis states the contents of the contract to the jury.

45 Q. Do you remember what time in the day it was, morning, afternoon or when, that you went to the National Discount Company in order to make arrangements for the transfer of accounts?
A. It must have been in the morning, I guess.
Q. Did you take with you any outstanding accounts?

A. I don't know whether I did right away, or after; I think it was after.

Q. Did you go twice to the place of business on that day?

A. Yes, sir.

Q. The second time that you went you had no accounts; is that the idea?

A. No, I didn't.

Mr. GAINSBURG: He said, "I don't know."

The WITNESS: I said I think I didn't have them.

Q. Your best recollection is that you didn't have accounts at that time?

A. That is right.

Q. Who did you have a talk with at the National Discount Company?

A. With Mr. Levison.

Q. Did Mr. Levison at that time say that he would——

Objected to as leading.

The COURT: Ask what was said.

Q. What did you say to Mr. Levison at the first interview?

Objected to on the ground that on that same day the agreement between the parties was reduced to writing; and any private parol agreement must have been merged in a written contract.

The COURT: Objection overruled. The evidence is not admissible for the purpose of contradicting the contract, but I think it must be admissible in other points of view; the jury have a right to know all that took place between the parties in connection with this matter, as well as the contract that was written.

46 Mr. GAINSBURG: May I ask the Court to require counsel to indicate for what purpose he asked this question?

The COURT: No, the jury have a right to know all the circumstances under which this contract was made.

Exception.

Q. Will you tell me the substance of your conversation with Mr. Levison at this first interview?

A. When I first came in I asked him whether he could lend me some money on accounts which I was very short; and he just said yes, if I would show him the accounts and the accounts were good; he said he would lend me the money.

Q. Was there no more that you recollect to that conversation?

A. Then I went and made out the bills.

Q. No, I mean this first conversation; before you had the bills, and before you signed the original agreements?

A. Yes; he said he would lend me so much money on the bills, whatever I had.

Q. He told you he would lend you a certain per cent on the bills?

A. Yes.

Q. Did he tell you how much he was going to charge you for the transaction?

A. I really cannot remember to-day; that is a thing that went out of my mind now.

Q. After you had had this first conversation with him, did you go to your office and get the accounts?

A. Yes sir.

Q. And you went with those accounts to Mr. Levison's place of business?

Objected to and counsel asks that the witness may be directed to state what he did.

The COURT: It is not leading to ask him whether he went back to the other office; when it comes down to actual conversation your point of view is correct, of course; I will overrule the objection now.

A. I went back to the office and made out the statements and I went over to Mr. Levison's with the statements.

47 By the COURT:

Q. Who is Mr. Levison?

A. That old gentleman there (indicating).

Mr. GAINSBURG: He is the president of the National Discount Company.

A. (continued). And I think, if I ain't mistaken, this gentleman didn't go with me (pointing to Mr. Lewis)—but I remember something—he came to my office and looked up every page on the books, and he took it off, and he stamped my books or marked something in the book—I don't know what it was—for so much, and took it off on the statement, the whole account, and then I went afterwards and he gave me a check for $3,000.

Q. Will you tell me what conversation you had with Mr. Levison, the president of the National Discount Company, the second time you went there, at the time you got the check? Give me the entire conversation, the substance of what you said to Mr. Levison and what he said to you?

A. He said, "What will be the result of the balance of the money? You only gave me $3,000——"

By the COURT:

Q. What did you say when you went in there?

A. I began to talk about getting the money.

Q. What did you say and what did he say?

A. I came in, I think, with the gentleman that took up the statements; we came up to Mr. Levison's office, and they looked it up and they gave out a check for $3,000 to me, and they went to get me the money.

Q. Didn't they say a word?

A. Well, they said for the balance if I wanted it I could get shares on their company.

By Mr. LEVIS:

Q. Will you state what they said?

A. Afterwards I could transfer the shares to anybody I wanted to,

either to my wife or my children, or anybody; that was what the conversation was.

48 Q. Did you have any conversation about your condition, whether your creditors were pushing you or not at that time, with Mr. Levison; did you have any talk with Mr. Levison as to whether your creditors were pushing you?

A. Yes, I simply told them I was very short of money; my creditors were pushing me, and I needed the money to pay them; that I had a note to pay off, and I must pay it off the next day or the same day—it was either the same day or the next day—a $2,000 note which I had to pay.

Q. And you told him you didn't have any money to give them?

Objected to.

The COURT: Tell us all that was said about that.

A. (continued). That was what I told Mr. Levison, that I needed the money; that is all.

The COURT: You can call his attention to any particular statement if you wish; now that he has said all he can remember.

Q. Did Mr. Levison state anything further to you that you remember now?

A. Nothing more.

Q. What else did you state to him other than that you have given?

A. Nothing else.

Q. You have stated that there was a note in the bank; in what bank was that note?

A. I don't remember now what bank it was; either in the Oriental Bank or the Union Exchange; one of these two banks.

Q. It was in the Oriental, wasn't it?

A. I wouldn't say for sure; I know it was in either one of the two banks.

Q. In either the Union Exchange or the Oriental; how much was this note for?

A. I think it was for $2,000, if I ain't mistaken.

Q. Do you know who was the endorser on that note?

A. I don't remember; no.

49 Mr. GAINSBURG: I object; isn't the note the best evidence? Objection overruled. Exception.

Q. Have you a son-in-law named Levinne?

A. Yes.

Q. Do you know whether your son-in-law was an endorser on that note, or not?

A. I don't remember now whether he was, or another one; I have got so many that I don't know which one it was.

Q. Well, it was one of your relatives that was endorser on the notes; you remember that, don't you?

A. Yes, sir.

Q. Who was the maker of the note?

A. I, myself.

Q. Does that refresh your recollection at all with reference to any conversation you had with Mr. Levison about your bank account?

A. I didn't have any money in the bank.

Q. You told him you didn't have any money in the bank?

Mr. GAINSBURG: He didn't say that.

A. I said that I didn't have any money in the bank.

Q. You said he gave you $3,000; in check or in cash?

A. He made out a check while I was there, and sent somebody down to the bank, I suppose, and he got the money and brought me up the cash.

Q. The fact is that it was handed to you in cash?

A. And I deposited it the same day and I paid it out with checks.

Q. What became of that $3,000 when you put it in the bank; who did you pay with that money?

A. I don't remember whether I paid the note the same day or the day after.

Q. I didn't mean the date you paid that note; I am asking what note you paid with that money; not whether you did it the same day; tell me whether you paid a note with that money?

A. A note for $2,000.

50 Q. And it was the one that you said was either in the Oriental or the Union Exchange Bank?

A. Yes.

Q. What become of the other thousand dollars of that money?

A. I paid rent; made out a check for the rent, but I didn't pay till about the 15th, the rent; I paid some other expenses; I had to pay about $500 rent.

Q. How much was the rent?

A. I think it was either $400 or four hundred and something, or a little less; I don't remember exact to a penny; I think $312.50.

Q. Do you know what you did with the rest of the money; that makes about $312; do you know what became of the rest of it?

A. I must have paid bills. I can't remember now.

Q. Did Mr. Levison, when he was talking about taking stock in the company, did he tell you what company you could take stock in?

A. In the National Discount Company.

Q. In his own company?

A. Yes.

Q. How much was the stock to be?

A. That, I can't say; how much I would have left.

Q. That is, how much you would have left over and above the cash that he gave you?

A. Yes, over and above the cash that he gave me.

Q. You said you had a second transaction with him?

A. Yes.

Q. That was the day before the failure, wasn't it?

A. No, that was the next day; that was the 16th, about.

Q. What happened on the 16th?

A. I got some more money the next day from him; a thousand dollars.

Q. You have said that this happened on the next day; was your memory any clearer with reference to the date when you testified before the Commissioner; wasn't your recollection clearer, and didn't you remember the dates better when you testified before the
51 Commissioner just after the petition was filed?

A. Well, I said I don't remember exactly which date it was.

Q. I want to know whether it wasn't Friday, the 18th day of August, that you transferred those accounts, and not the 16th day?

A. I can't tell.

Q. When you got the thousand dollars?

A. I don't exactly remember the date; whether it was the day after or two days after.

Mr. GAINSBURG: It was the 18th.

Q. When did you go to the place of business of the National Discount Company that day, morning or afternoon, or when?

A. In the morning.

Q. Did you take any accounts with you at that time?

A. I guess I did.

Q. Was there anybody else with you at that time?

A. I don't remember.

Q. I want to recall just one further thing; the original transaction on the 15th of August; did Mr. Levison request any guarantor for these accounts; anybody to guarantee them?

A. I don't remember.

Q. Didn't he ask that Mr. Schiller guarantee those accounts?

Objected to. Objection overruled. Exception.

Q. Didn't he ask that your son-in-law, Mr. Schiller, guarantee your accounts?

A. If he did it, he did without me knowing it.

Mr. GAINSBURG: I think the answer doesn't mean anything and should be stricken out.

The COURT: He says he don't know.

52 Met pursuant to adjournment at 2 p. m. as before.

Mr. LEVIS: I should like to put Miss Fellerman on the stand now and suspend the examination of Mr. Fellerman.

BELLA FELLERMAN, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. LEVIS:

Q. You are the daughter of Abraham Fellerman, the last witness, are you not?

A. Yes, sir.

Q. What were you doing prior to August, 1905; what was your business?

A. Bookkeeper.

Q. For whom did you keep books?

A. With A. Fellerman & Son.
Q. You were employed by your father's firm?
A. Yes, sir.
Q. Will you tell me in general what books were kept by that firm?
A. Sales book, ledger, cash book, check books.
Q. You kept those books yourself, did you?
A. Yes, sir.
Q. Did you keep a day book as a part of the cash book?
A. No, sir.
Q. Can you tell me how much was owing by the firm of A. Fellerman & Son on the 15th of August, at the time of this first transaction with the National Discount Company?

Objected to as incompetent, irrelevant and immaterial unless connected with the defendant or knowledge of that fact conveyed to the defendant. Objection overruled. Exception.

A. About $38,000, I think.
Q. Can you tell me how much was owing by the firm of A. Fellerman & Son at the time the petition in bankruptcy was filed, four days later?

Same objection, ruling and exception.

A. $31,000.
53 Q. Do you know how much was owing to the firm of A. Fellerman & Son from the customers to whom they had sold merchandise?
A. $12,000.
Q. That was on the 15th of August; did you take off statements of the outstanding accounts in order to have them sent to the National Discount Company August 15th?
A. No, sir.
Q. Do you know who took off those outstanding accounts?
A. One of the members of the National Discount Company.
Q. Will you tell me what you know happened on the 15th of August so far as your own office was concerned?
A. How do you mean?
Q. I want to know what you saw the representative of the National Discount Company do in the place of business of A. Fellerman & Son?
A. They made out statements of the accounts of people owing us money and I suppose made their collections.

Counsel moves to strike out the answer after the words "owing us money."
It is stricken out.
The COURT: State all you saw.

By Mr. LEVIS:

Q. They were shown your books of account, were they?
A. Yes, sir.
Q. Did the person who came ask you for any of the books of account?

A. Yes, sir.
Q. What books do you remember he asked for?
A. The ledger.
Q. Any other?
A. I don't think so.
Q. And you gave him the ledger?
A. Yes, sir.
Q. Did he tell you where he came from?
A. The National Discount Company.
Q. Can you identify the persons from either of the two gentlemen who are here in Court?
A. Yes, sir; I think it is the gentlemen with the glasses (referring to Mr. Lewis); I don't know his name.
Q. Did he make any marks of any sort in your books?

Objected to that the record is the best evidence. Objection overruled. Exception.

54 A. Put their stamp on the page of the book on each account.

By Mr. ELKUS:

Q. What was the stamp?
A. I don't remember.

By Mr. LEVIS:

Q. Did this gentleman take his statements away with him after he had finished?
A. Yes, sir.
Q. Do you know anything more about that transaction other than the making out of the statements?
A. No, sir.
Q. Did you or anybody in your presence give any billheads to the representative of the National Discount Company, Mr. Lewis?
A. Yes, I did.
Q. What kind of billheads were they?
A. Of our own firm.
Q. And the items that he took from the books were taken off onto those statements of your firm?
A. Yes, sir.
Q. You have stated that the ledger was handed to Mr. Lewis; did he go all through it?
A. Yes, he did.
Q. Will you tell me whether that ledger contained both the creditors and debtors of the firm of A. Fellerman & Son?
A. No.
Q. Were the creditors in another ledger?
A. Yes, sir.
Q. Were the other books shown to Mr. Lewis?
A. No, sir.
Q. Did he ask for any of the other books?
A. I don't remember.
Q. Do you remember this: was there any book refused him that

he asked for; you didn't tell him that you would let him see any book that he asked for, did you?

A. No, sir, I did not.

Q. Did you take off the accounts, any further outstanding accounts, yourself; did you make out any statements any other time?

A. Yes, sir.

Q. When was that?

A. About four or five days previous to the failure.

55 Q. Did you make any marks in the books of those that you had taken off?

Objected to as not binding upon the defendant.

The COURT: It is not evidence against you on the ground that there was any evidence that your client knew it; it is simply as evidence of their acts at the time.

A. Yes, sir.

Q. What was the mark, a check mark or what sort of a mark?

A. Yes, sir, there was a check.

Q. Do you know to whom those statements, that you took off the books, the outstanding accounts, to whom they were?

A. To Mr. Stich.

Q. You didn't take off any statements for the National Discount Company at all?

A. No, sir.

Q. When the National Discount Company had taken off their own statements, and you had taken off the statements for Mr. Stich, can you tell me whether there were any more outstanding accounts in those books?

A. Yes, there were about three or four.

Q. Can you tell me approximately how much those three or four aggregated?

A. About $500.

Q. So that all the accounts on the books of A. Fellerman & Son, with the exception of these two or three, had been assigned to either the National Discount Company or to Charles Stich; is that the fact?

A. Yes, sir.

Cross-examined by Mr. GAINSBURG:

Q. You were examined before this in the bankruptcy proceeding of your father?

A. Yes, sir.

Q. And you didn't have the books then when you were examined?

A. No, sir.

Q. And you haven't seen them since that day?

A. No, sir.

Q. How do you know to-day that the indebtedness of the firm of A. Fellerman & Son on August 15 was $38,000?

56 A. We owed the American Woolen Company about $11,000, I believe; there was Boessneck Broesel; there was A.

Ruche & Co.; Eisemann & Company, and various others, I can't think of them just now.

Q. Did you think of them before you came on the witness stand here?

A. Not just every minute.

Q. Did you think of it when you consulted with Mr. Levis or Mr. Elkus about this matter?

A. I haven't been in consultation with them.

Q. So that when they asked you to state what your various firm liabilities were on August 15, 1905, they did not know whether you were able to answer who, or whether you would be able to answer it or not?

Objected to.

A. I was able to——

Q. Did you tell them before this; did you ever tell Mr. Elkus—you know Mr. Elkus, don't you?

A. Yes, I have seen the gentleman before.

Q. You have known him for the past three years?

A. I saw him once or twice.

Q. Did you ever tell Mr. Elkus what your father's firm's liabilities were?

A. No, but I think he was present at the examination.

Q. Who was present?

A. Mr. Elkus.

Q. At whose examination?

A. When I was examined.

Q. Did you ever state that your father's firm's liabilities were $38,000?

A. I think I did.

Q. Are you sure about it?

A. Yes, I think I am.

Q. Were you ever present at any examination at which Mr. Fellerman was examined?

A. My father, do you mean?

Q. Yes?

A. Yes, I think so.

Q. Did you hear him state what the firm's liabilities were?

A. I don't remember.

Q. Did you hear what he said about it when he was asked?

57 Mr. ELKUS: I object on the ground that that has nothing to do with this case.

Objection overruled. Exception.

A. I don't remember what he said.

Q. Don't you remember that he refused to answer that question?

A. No; I don't remember.

Q. Were you present when your brother was asked about it?

A. No, sir.

Q. And also based upon your memory of the transaction, you said that on August 19, the day of the failure, the liabilities of the firm were $31,000; is that right?

A. Yes, sir; that is right.

Q. You say Mr. Lewis called at your office and examined the ledger; that was August the 15th?

A. Yes, sir.

Q. And was the ledger there on August 19th?

A. I left it there.

Q. Of course you don't know what has become of it?

A. Not since; no.

Q. And your last appearance at your father's place of business was August 19th?

A. Yes, August 19th.

Q. When you left there did you lock the place, or did you leave your father and brother there?

A. No; I locked it.

Q. How much accounts did Mr. Lewis's statements of accounts—how much did he take away with him?

A. Close onto $8,000.

Q. Do you understand my question?

A. Yes, sir.

Q. Do you mean to say that you saw him take off and make out statements of account aggregating $8,000?

A. About $8,000.

Q. Was there subsequently another batch of accounts transferred and assigned to the National Discount Company?

A. Yes; there were a few.

Q. Aggregating how much?

A. It might have been about $300 or $400.

Q. And how were those accounts brought to the National Discount Company?

A. The man came for them and made them out himself.

58 Q. The same gentleman?

A. I don't remember.

Q. But you saw another man come from the National Discount Company and make out statements of accounts and take those statements away with him?

A. Yes.

Q. And when you say he stamped those accounts in the ledger can you recall what that stamp was?

A. No, sir.

Q. Was that stamp that the account was assigned to the National Discount Company?

A. I don't recall it.

Q. Did you ever make out a list of accounts and hand them to your father for the purpose of taking to the National Discount Company?

A. No, sir, I did not.

Q. When was the first batch of accounts taken away by a representative of the National Discount Company?

A. It was on the 14th or 15th of August.

Q. And the second?

A. A couple of days after that.

Q. How long before the failure?
A. About two days.
Q. When was the failure?
A. August 19th, 1905.
Q. That was on a Saturday?
A. Yes, sir.
Q. How many days prior to that was the second batch of accounts taken away by the representative of the National Discount Company?
A. I think it was Thursday.
Q. That would make it the 17th?
A. The 17th.
Q. And the first batch was the 14th or 15th?
A. Yes, sir.
Q. You are sure of the dates and you are sure of the amount of accounts that the representative of the National Discount Company took away with him?
A. Yes.
Q. You have never testified about this transaction before, have you?
A. No, sir.

59 ABRAHAM FELLERMAN resumes the stand.

Direct examination resumed by Mr. LEVIS:

Q. I was asking you about what happened the second time you went to see Mr. Levison on the 18th of August?
A. I just brought him along some more claims.
Q. Will you tell me what talk you had with Mr. Levison and what talk he had with you about that time; this was the day before your failure that you went there and got the second assignment of accounts?
A. The conversation was that I brought him in the statements of the balance and he gave me a thousand dollars, and then he said if I wanted to take some shares in his company for the balance he would give me shares in their company, and I could transfer the accounts to whoever I wanted to; the balance.
Q. Then he told you the same thing he did the first time, about taking shares in his company for the equity?
A. Yes.
Q. You mean transfer the shares of the National Discount Company instead of the accounts, don't you?
A. Yes.
Q. Did you take the accounts to him that time; are you sure, or did he send up to your place of business?

Objected to as to form; the witness stated that he took the accounts to him.
The COURT: He can test his memory in that way; I will overrule the objection.
Exception.

A. I said the last time I don't remember whether I went up

there or he sent the second time to me; but I think I went myself, but I am not positive.

Q. Will you tell me how much money he gave you that second time?

A. I think it was a thousand dollars.

Q. One thousand dollars?

A. Yes.

60 Q. Was that given to you by check or in cash?

A. In cash.

Q. Did he give you $1,125?

A. No, sir.

Q. Are you positive of that?

A. Yes.

Q. There has been offered in evidence a statement of the National Discount Company which states that they advanced to you $4,475.35; did they give you $4,475?

A. They never did.

Q. How much did they give you altogether on both occasions?

A. The first time they gave me $3,000, and the second time they gave me $1,000.

Q. And you are positive that you never were given $4,475 as they stated to the trustee?

A. No.

Q. You are positive you did not get that sum?

A. I am positive.

Q. Do you know whether there was anybody with you when you went there the second time or not.

A. I don't think so.

Q. Did you say you don't think so, or you don't remember. I didn't catch it?

A. I don't remember.

Q. What did you do with that thousand dollars? did you deposit it in your business bank?

A. I am not sure; I don't remember whether I did or not.

Q. Can't you tell me whether you deposited that in your bank or not; the cash you got from Mr. Levison?

A. I don't remember to-day, honestly.

Q. Can you tell me what you did with that thousand dollars?

A. I must have deposited it, because I paid it out in checks; I remember that we paid it out the same day that I got it, to O. L. Dommerich; I gave him that out, to that commission house, the same day I got the money.

Q. Where did you go after you had arranged with the National Discount Company; where did you go afterwards, after you got through with Mr. Levison?

A. I went home.

Q. When you say home do you mean to your place of business or your house?

A. To my place of business.

Q. Did you transfer anything more that day?

A. No.

61 Q. Did you have some dealings with Mr. Gordon that day?
A. Yes; with Mr. Gordon; yes.
Q. What is his first name?
A. I really don't know his first name now.
Q. Where did you meet him?
A. I met him somewhere in Broadway, on the corner of Worth Street and Broadway.
Q. Where was it you met him? I mean in what kind of a place of business, a store or a saloon?
A. In a saloon on the corner of Worth Street.
Q. What conversation did you have with this Mr. Gordon?

Objected to as incompetent, irrelevant and immaterial and not binding upon the defendant. Objection overruled. Exception.

A. About the equity of the accounts; that they should buy it off me, because I needed money; and I offered that they should lend me some money on that equity.
Q. That is, you offered to sell him the equity in the National Discount Company accounts, the surplus?
A. Yes.
Q. What did he say to you?

Same objection, ruling and exception.

Mr. GAINSBURG: I object to all the testimony as regards Gordon. Same ruling and exception.
Q. How much did he offer you for those accounts?
A. $750; he offered me $750 till we got down to $900.
Q. What did you finally get from him?
A. $900.
Q. You sold him the equity for $900?
A. Yes.
Q. Did you draw up any instrument at all; were there any papers signed?
A. I think there was; yes, sir.
Q. Who drew up those papers, do you know?
A. I think in the office or somewhere else; I don't remember now.
62 Q. Did you purpose for somebody to draw up an assignment for you?
A. Yes, Abner Woerblin.
Q. And he drew up this assignment for you?
A. Yes
Q. And you signed it, transferring this equity to Mr. Gordon?
A. Yes.
Q. Did you get that $900 in cash or a check?
A. In cash.
Q. Where had you met Mr. Gordon before?
A. I think on Broadway and Worth street.
Q. Where did you ever see him before this time?
A. I think I must have met him somewhere before it; I can't remember.

Q. Can you tell me how he knew that you were Mr. Fellerman?
A. I can't remember now how it happened.
Q. How did you come to go to this particular place in Worth street; this saloon; how did you know you would meet him there? Did somebody arrange that you were to meet him in that saloon?
A. I can't remember exactly how it happened; it is out of my memory now; it is a long time ago, and it went out of my memory; I can't exactly remember or know where; but I know I met him in Broadway, corner of Worth street, in a saloon there, and sold him the equity.
Q. Did you have any previous talk, or any previous conversation with him about buying this equity before you went up to that saloon?
A. If I remember, somebody told me that Mr. Gordon would buy it if I would meet him, and I think I met him that time on Broadway, and we made it up.
Q. After you left Mr. Gordon where did you go?
A. I went back to my business.
Q. Did you see a lawyer that day?
A. I think I saw a lawyer the day before that
Q. Did you see a lawyer that day, too?
A. Yes, I saw him twice.
Q. What was the name of the lawyer?
A. Leonard Bronner.
63 Q. Had he been your attorney before this time?
A. No, I had never known him before.
Q. How did you come to go to Leonard Bronner?
A. Well, that was after I came from Mr. Levison's; the first day, that was when I sold him the claims; it didn't take ten or fifteen minutes when I got a telephone call up that Leonard Bronner wants to see Mr. Fellerman, and I asked my daughter if she knew anybody by that name, and she said no; and then I waited until my son came and asked him if he knew anybody by the name of Leonard Bronner, and he said he didn't know either; so I said, "What shall I do? I don't know that man"; and he said, "Well, Pop, you go up there and find out what he wants; he is a lawyer;" he called us up and said he was at 320 Broadway, or something of that kind, 309 Broadway, or something like that; I don't remember exactly now; and I should come there at once; so I asked my son what I should do and he said, "Well, go up," and I went up there and came in his office, and a boy asked me who it was I wanted to see, and I said, "I got a telephone to call to see Mr. Bronner," so he went and he asked me my name, and he went on in and came out and said, "Come right in;" so I came in and I never knew that man, and he said, "Is your name Fellerman," and I said, "Yes"; and he said, "I understand that you are going to fail." The man nearly killed me that time he told me that; I didn't have it in my mind at all. He said, "You are going to fail," and I said, "No, I am not going to fail."
Q. This conversation that you just told was the same day you made the first assignment, wasn't it?

A. Yes, sir.

Q. Did you see Mr. Bronner again the day you made the last assignment on the 18th?

A. The next day he called me up again, and he said, "I know you are going to fail; before you go to anybody else, I want to be your lawyer"; that was all that he told me, and I said "No," and he made me so much frightened that I lost myself and I saw
64 that something was wrong—I didn't know what to make of it, and I said, "All right, be my lawyer, and protect me"; that is all, that is as true as you are sitting here, that that man killed me after that (referring to Mr. Levison).

Q. After you had gotten through with Mr. Gordon in this saloon did you assign some more of your accounts, or all of them, to Mr. Stich?

A. Yes.

Mr. GAINSBURG: I object and move to strike out the answer as incompetent, irrelevant and immaterial.

Objection overruled and motion denied.

Mr. Gainsburg excepts.

Mr. GAINSBURG: I also make the same objection to any further questions about the Stich account.

Same ruling and exception.

Q. Do you know what was the amount of accounts that went to Mr. Stich?

A. I don't remember the amount, but I know that I got $3,000 for it.

Q. You got $3,000 in money?

A. In cash.

Q. In checks, wasn't it?

A. Yes, a check endorsed, but I got the money on it.

Q. Do you mean endorsed by him?

A. I mean endorsed by him and by me, too.

Q. Where did you get the money—at your own bank?

A. No, at his bank.

Q. At Mr. Stich's bank.

A. Yes.

Q. When did you get it; that afternoon or the next morning?

A. I don't remember whether it was in the afternoon or in the morning.

Q. About what time was this transaction with Mr. Stich going on?

A. In the afternoon.

Q. Well, four or five or six o'clock.

A. I couldn't say—it wasn't so late as that.

Q. Isn't it a fact that you didn't get that check until long after five o'clock?

A. It may be, but I don't remember whether I got it the same day or the next morning.

65 Q. I am trying to find out when you cashed the check—when you got the money: isn't it a fact that you didn't get

the check until after banking hours had closed, after five o'clock on the 18th of August?

A. It may be; I don't remember whether it was the 18th or the 17th or the 19th.

Q. What did you do with the money you got from Stich, with the $3,000?

A. I gave the lawyer $1,000.

Q. And what did you do with the rest?

A. $1,500 I used for the payroll in the shop.

Q. What other payments did you make?

A. I don't know, I can't remember.

Q. Didn't you make a payment of a confidential loan?

A. Oh, yes, $350.

Q. To whom?

A. To Jake Beyer.

Q. A friend of yours?

A. A friend of mine, he lent me money.

Q. Do you remember when you made this payment to Mr. Bronner of $1,000; was it the morning the petition in bankruptcy was filed, or the night before?

A. No, the day before; Friday or Saturday; I don't remember which.

Q. Which is it; Friday or Saturday? Isn't it a fact that you cashed that check just as the bank opened Saturday morning, and that you then gave money to Mr. Bronner?

A. That is right; that was Saturday morning; yes.

Q. Then that check was cashed about what time in the morning?

A. About ten o'clock in the morning.

Q. Were you ever put in jail, in a proceeding which arose in this bankruptcy?

A. In this case?

Q. Yes?

A. Yes.

Q. How long were you there?

A. Over night; the judge discharged me.

Q. Who was the judge that sent you to jail?

A. I don't remember what judge it was.

Q. It was in this same bankruptcy proceeding, wasn't it?

A. I think it was this judge.

Mr. LEVIS: I will offer in evidence the order.

66 Q. Your son was also committed, wasn't he?

A. Yes.

Mr. LEVIS: It was the order of the Honorable Charles M. Hough, one of the judges of this Court, decreeing that both Abraham Fellerman and his son, Isador Fellerman, were guilty of contempt of court in refusing to turn over the books of account to the trustee in bankruptcy, and committing them to Ludlow Street jail for a period of two months.

Mr. GAINSBURG: Was that the only reason for their being committed to Ludlow Street jail?

Mr. LEVIS: The only reason that I know of.

Mr. GAINSBURG: Let me see if I can't find another reason; (reading from the order):

"that the said Abraham Fellerman and Isidor J. Fellerman have each and severally given testimony which was intentionally and wilfully false, in the presence of the said Referee in Bankruptcy, and the said Special Commissioner, after having been duly sworn to tell the truth, and that said Abraham Fellerman and Isidor J. Fellerman in the presence of the said Referee and Special Commissioner when being duly examined under oath by order of this Court intentionally and wilfully gave vague, contradictory, evasive and contemptuous answers to material inquiries at such examination, and such testimony being in wilful disobedience of the said orders of this Court, and that said Abraham Fellerman was guilty of wilful, false swearing when under examination as a witness pursuant to an order of this Court made August twenty-third, 1905, and that Isidor J. Fellerman was guilty of wilful, false swearing when under examination as a witness pursuant to an order of this Court, made August twenty-third, 1905; and it appearing to the satisfaction of this Court," &c.

67 Cross-examined by Mr. GAINSBURG:

Q. You and your son were members of the firm of A. Fellerman & Son?

A. Yes.

Q. At the time when you came to the office of the National Discount Company—what day was that, by the way?

A. I think the 15th.

Q. Well, the 15th of August is the date of this agreement; that is the day that this agreement was signed; but don't you recall having been at the office of the Company before that day?

A. No, sir.

Q. Who sent you to the National Discount Company?

A. A party by the name of Solomon.

Q. Mr. Max Solomon?

A. Yes.

Q. You had heard of this concern, that they were in the banking business, discounting accounts for merchants?

A. No, sir, I never knew of them.

Q. You never heard of them?

A. I never heard of them.

Q. How did you come to go to Mr. Solomon?

A. Well, he was a friend of mine, and I told him I was short of money, and I used always to lend money to him; and he said, "You go to that friend of mine"; he even went with me that day.

Q. Did he go with you the first day that you went there?

A. I think so; I am not positive, but I think so.

Q. Isn't it the fact that you were at that office the 10th of August, 1905, and discussed with Mr. Levison—that is, talked with Mr. Levison—about what he would charge you for commissions?

A. I don't remember that.

Q. Will you swear that you weren't there on the 10th of August, and talked with him about the commissions that he would charge you?

A. Not as I remember.

Q. Didn't you on that day receive a copy of this agreement, and take it away with you to read it over?

A. Never; that I never got.

Q. Did you get this agreement and take it away with you before you signed it the 15th of August, 1905?

A. No, sir.

68 Q. Didn't you, upon your direct examination, say that you didn't remember whether you signed it at your office or at the office of the National Discount Company?

A. Yes, sir.

Q. Can you tell where you did sign it?

A. I don't remember; I say the same thing; I don't remember whether I signed it here or there; I don't remember.

Q. If you signed it at your place of business, can you state where you got this agreement?

A. I don't know whether I signed it there or at Mr. Levison's; I don't remember that.

Q. Did your son bring the agreement to you to sign?

A. No.

Q. Your son had nothing to do with this transaction?

A. No.

Q. How many days elapsed—that is, went by—between the first time you saw Mr. Levison and the time you signed the agreement?

A. No days at all; that was the first time that I ever met Mr. Levison.

Q. In other words, you called there on the 15th of August; he read you this agreement; you read it over——

A. No, I can't read or write.

Q. Did he read it over to you?

A. Yes.

Q. He read you the whole thing?

A. I suppose he did.

Q. Not what you suppose; did he?

A. I don't remember.

Q. How long did it take to read it to you?

A. I don't remember.

Q. Did he read it to you at all?

A. He did read something, but I don't remember whether he read it all or not.

Q. Did you discuss with him the charges he would make?

A. I don't remember about the charges; he said he would give me seventy-five cents on the dollar.

Q. Didn't he tell you, and didn't you ask him, what commission he would charge you?

A. I think he said six per cent.

69 Q. Six per cent. for what?

A. For paying the money out.

Q. Didn't you say it was too much?
A. I used to pay the bank six per cent., so I thought that was liberal.
Q. You agreed to that?
A. Yes.
Q. What else did you discuss with him?
A. I discussed with him about how much statements, he should send his man over there to make up the statements, and the minute he would get the statements over and signed by me he would give me the money.
Q. And that was all the discussion you had with him at that time?
A. Yes, sir.
Q. And that was all the discussion you had with him at that time?
A. Yes, sir.
Q. And then you signed the agreement?
A. Yes, sir.
Q. And there was nothing said about what he would charge you commissions for collecting the accounts, was there?
A. Six per cent.
Q. That was all that was discussed?
A. That was all.
Q. He didn't say he would charge you five per cent. for collecting the accounts, did he, besides six per cent.?
A. I don't remember that.
Q. And didn't you say to him that the charge was too much, and didn't you go away and come back again the same day?
A. I don't remember no more than six per cent.; whatever more there was I don't remember.
Q. Was this figure "5" (indicating) written in the agreement when you signed it?
A. I can't read and write; I know my signature; that is all.
Q. Can you tell figures?
A. Yes.
Q. Can you tell that this — a "5"?
A. Yes.
Q. Was it there when you signed this paper?
A. I can't say whether it was or not; I am not certain.
Q. On the 15th of August, 1905, did you talk with Mr. Levison about your financial condition?
A. About what?
70 Q. About your financial condition?
A. No, I just simply told him I needed money.
Q. You understand what I mean by the words "financial condition"?
A. Yes.
Q. Did you talk with him about it?
A. No.
Q. Did you say to him whether you were solvent or insolvent? Do you know what solvent or insolvent means?
A. Yes.

Q. Did you say anything to him about that at that time?
A. No, I didn't say nothing.
Q. Or at any time?
A. No.
Q. You merely told him you needed the money?
A. I told him I needed the money to pay my bills; I was hard up.
Q. Did you on August 15th, when you signed this agreement, bring him accounts?
A. No, he sent his manager over to my place, and he made out himself the statements and bills and everything.
Q. How much did he receive on that day, of accounts?
A. I really cannot tell you.
Q. Was it $8,000?
A. I don't know how much.
Q. On the 18th of August, 1905, how many accounts did you bring him?
A. That, I think was the last—was about $2,500; and that is what I remember.
Q. On the last date it was how much?
A. About $2,500, or something like that.
Q. You brought those to him?
A. Yes.
Q. You are sure about that?
A. I don't remember whether I brought it to him, or he got it from my place; I don't remember.
Q. Who made out those accounts for you?
A. Well, he did himself.
Q. Both of the dates?
A. No, sir; the second, I think, my daughter made out.
Q. And gave it to you?
A. Gave it to me—I think he came down there the next day to get it.
Q. And your daughter made it out before.
A. Yes.
Q. You are sure of that?
A. Yes, he came there the next day and got the accounts.
71 Q. Your daughter said she did not make out any accounts for him; do you remember whether she did or did not?
A. The second time. I am talking about the second time.
Q. Did she make out the accounts the second time?
A. I don't know whether she did.
Q. Isn't it the fact that you brought the accounts to the National Discount Company yourself, both the first and the second time.
A. No, sir.
Q. Didn't you say so upon your direct examination, in answer to Mr. Levis's question?
A. I say I don't remember exactly whether I did or not.
Q. And you don't swear that this young man went to your office and made out the accounts himself; do you?
A. I say I don't remember.
Q. And when you said upon your direct examination that you

brought the accounts yourself to the National Discount Company were you guessing at it?

A. I don't remember even then what I said.

Q. But do you remember now what you said half an hour ago in answer to counsel's question that you brought those accounts yourself to the National Discount Company?

A. No, I said I don't remember.

Q. You got $3,000 on the 15th of August?

A. Yes, sir.

Q. And that $3,000 you deposited in your bank?

—. Yes.

Q. Did you tell Mr. Levison why you wanted that in cash?

A. I didn't tell him anything about cash.

Q. Well, you got a check, didn't you?

A. He gave me cash. He didn't give me no check.

Q. Didn't he give you a check for $3,000?

A. No, he gave me cash.

Q. Didn't he go to the bank with you.

A. I didn't go to no bank; he brought me the money himself.

Q. Didn't you go with this gentleman (referring to Mr. Debolt) to the bank with a check for $3,000 and got the money there, the $3,000?

A. I waited in the office, and he brought it up to me.

72 Q. Did you see a check for $3,000 drawn?

A. Yes.

Q. Wasn't that check handed to you?

A. No.

Q. And didn't you say when that check was handed to you: "I have got to meet a note for $3,000; it is due to-day; and I want to deposit the cash to meet it, and if I deposit a check they may protest this note, as it may take twenty-four hours before it goes through"?

A. I don't remember saying anything; I just simply said I needed to deposit the money to-day.

Q. Will you deny having said that?

A. I don't remember.

Q. You don't remember whether you said it?

A. I only remember I got $3,000; that is all.

Q. That $3,000 you deposited in the bank, whether you got it in cash or otherwise.

A. Yes.

Mr. GAINSBURG: I ask for the production of a check on the Pacific Bank for $3,000, which is in the possession of the trustee.

Q. That $3,000 you used to pay off a debt, did you not?

A. I don't remember whether I paid $3,000 or whether it was $2,000 or $3,000.

Q. Well, isn't it a fact that it was $3,000, and don't you remember testifying in the bankruptcy proceeding when Mr. Levis——

A. I can't remember; I can't remember; it is many years ago.

Q. Wasn't it $3,000 that you paid out?

A. I don't remember.

Q. Do you remember testifying (p. 76 of your testimony):
"Q. What did you do with the $5,000 that you got from the National Discount Company?"

Mr. LEVIS: That should be $3,000; it is in my record $3,000.

The Fifth Juror examines the record and says:
"That is a '5'."
73 Q. The record may be wrong, but it is a "5."

"Q. What did you do with the $5,000 that you got from the Discount Company?
"A. I paid the same day $3,000 to the bank; I have got it here."

Mr. ELKUS: As a matter of fact, it is another——
Mr. GAINSBURG: It is four.

Q. (Reading from former testimony of Fellerman).
"I paid the same day $3,000 to the bank; I have got it here."

and then you produced a note which counsel has lost?
A. Well, it must have been so; I don't know; I don't remember it now.
Q. So that every dollar that you got from the National Discount Company on that day was paid out by you to the bank to meet this note?
A. I don't remember.
Q. Don't you remember whether you made this note:

"EXHIBIT 4.

May 5th, 1905, $3,000 payable in three months, endorsed by J. Levinne"

and you answered "Yes, sir"?
A. Was it the same date?
Q. It was the same date; it was due on August 15th?
A. Well, it must have been paid then.
Q. And you had no other money in the bank?
A. No.
Q. And you must have paid it with that money?
A. It must be.
Q. You didn't borrow any money from anybody else that day?
A. Well, I had borrowed some money.
Q. Before that?
A. Yes.
Q. On that same day?
74 A. Well, maybe not; I don't remember; I can't say; I don't remember; but I know I paid the note.
Q. You didn't keep a dollar of it yourself, did you?
A. No.
Q. You paid the $3,000, didn't you; you didn't borrow this money to put it away somewhere for your own benefit, did you?
A. No.

Q. You got that money to pay off this note?
A. Yes.
Q. And the only thing you said you told Mr. Levison that day was that you had a note to meet in the bank; is that right?
A. I don't remember saying that; maybe I did; I won't say either way.
Q. Well, you testified on your direct-examination that you did, didn't you?
A. Well, you know it; why do you ask me again?
Q. I have a right to ask you.
A. Well, I don't remember.
Q. You understand that you are sworn to tell the truth.
A. Yes, but I don't remember.

By the COURT:

Q. You understand that if you do remember a thing you must say so, and, if you don't then say you don't remember; now, pay attention to the questions that are asked you and answer them correctly?
A. I don't remember whether or not.
Q. Do you remember whether or not you stated to Mr. Levison on that day that you had a note to meet for $3,000?
A. I don't remember a thing; I swear that I don't remember; maybe I did and maybe I didn't; I won't say positive; I don't remember saying that.
Q. Do you remember testifying this morning that you told Mr. Levison that you had a note to meet for $3,000?
A. Maybe I did, I say.
Q. Do you remember saying it this morning?
A. I don't remember whether I did or not—this morning?
Q. Or this afternoon, after two o'clock?
75 A. I don't remember saying that; I say maybe I had to pay a note; I know I had to pay a note.
Q. Do you remember saying this morning that you told Mr. Levison you were short in the bank; did you say that?
A. To-day?
Q. Either to-day or to Mr. Levison on August 15, 1905?
A. I don't remember.
Q. Do you remember whether you testified so this morning, or this afternoon?
A. I don't remember I testified that.
Q. Did you tell Mr. Levison on August 15th or 18th that your creditors were pushing you?
A. I don't remember having a conversation with him like that.
Q. Did you testify this morning or this afternoon that you told Mr. Levison on August 15th that your creditors were pushing you?
A. I don't remember that.
Q. Don't you remember when your counsel stood up here, and used the words, "Didn't you tell Mr. Levison that your creditors were pushing you"—and I use the very words—don't you remember his asking you that question?

A. To-day?
Q. To-day?
A. I don't remember saying that.
Q. Did you tell Mr. Levison that?
A. As I say, I don't remember having any conversation with him except about the money. that is all.
Q. The only conversation that you remember having with Mr. Levison was that you wanted money on these accounts?
A. Yes.
Q. Now the second transaction; when did that occur, the second time, when you got the second money; what day did that happen?
A. A day or two later; I don't remember exactly.
Q. It was on the 18th, how many times were you in Mr. Levison's office on the 18th?
A. I don't remember.
Q. How many times altogether were you in his office between either the 10th and the 18th, or the 15th and the 18th?
A. I don't believe I was there more than twice.
76 Q. No more than twice?
A. Not more than twice.
Q. Were you there twice on the 19th?
A. No; only once.
Q. And that was in the morning?
A. In the morning—I can't remember.
Q. Was anybody with you on either of the two times that you say you were there?
A. Not as I remember; the first time I was there myself, and then I sent a man after he got the bills.
Q. And the second time when you went there were you there yourself?
A. I think so; I don't remember whether I went with anybody there; it may be.
Q. And you got some money on that day?
A. Yes.
Q. Did you on that day tell Mr. Levison that your creditors were pushing you?
A. I can't remember.
Q. Isn't it a fact that the only talk you had with him that day was about the accounts, and how much money you were to get, and nothing else was said?
A. I don't remember having any other conversation, except the conversation that he told me what other equity I had there that I could get shares on.
Q. You don't remember anything that occurred other than the statement of Mr. Levison to you that the equity should be transferred to your wife after buying stock?
Mr. ELKUS: He didn't say that.
A. No; shares.
Q. That the shares should be transferred to your wife?
A. That I should transfer them to anybody I wanted; either my wife or daughter.

Q. When did Levison say that to you; the first day you were there, or the second time?
A. He said it the first time.
Q. And the second time?
A. I don't remember about that.
77 Q. Didn't you testify in answer to your counsel's question that he said it to you the second time when you got that thousand dollars in cash?

Mr. ELKUS: No, he didn't.

Q. I will repeat my question, and please listen to it; did Mr. Levison say to you the first time that you were there, or the second time, or both times, that you should buy stock in the company?
A. For the first time I remember I had it in my mind all the time; but the second time I don't remember whether he did or not.
Q. Didn't you say this morning to your counsel that he did say it the second time, at the second meeting that you had with him?

Mr. ELKUS: I have not the honor of being his counsel.
Question withdrawn.
Mr. ELKUS: I object to the question because it is not clear to a man of his intelligence what Mr. Gainsburg means.
Mr. GAINSBURG: I object to the suggestion of counsel; I will withdraw my question.

Q. Do you remember testifying this morning in answer to Mr. Levis' question, that Mr. Levison of the National Discount Company told you the second time, when you met him, that you should buy stock in the corporation?

Mr. ELKUS: I object, unless you want to make it appear—if you are trying to make it appear that he only told him the second time—I object because it endeavors to imply something contrary to what the witness has testified; he says he remembers distinctly that Levison told him the first time, or suggested to him, that he could take the stock in Levison's corporation, and that he could give it to his wife or daughter or somebody else, and nobody need to know it, and I understood him to say that he wasn't so sure of it the second time.
78 Mr. GAINSBURG: He said he didn't remember, and I want to know what he testified to this morning.
Objection overruled. Exception.
The COURT: My recollection is that some time in this testimony he said that he said so the second time; but it will be for the jury to say.

Q. Now, I want to know if you recall having said that this morning?
A. I know I hadn't spoken a second time to Mr. Levison about it.
Q. Then you were mistaken this morning when you said you did speak to him about it, when you got the thousand dollars the second time, were you?
A. I don't remember.
Q. That is the best answer you can give?

A. I positively don't remember, no; you have mixed me up, and I don't know what I am talking about.

Mr. GAINSBURG: I ask for the production of the cash receipts in the hands of the trustee.

They are produced.

Q. How much did you get on the 18th of August from the National Discount Company?

A. A thousand dollars.

Q. Are you sure about that?

A. Yes, sir.

Q. Did you sign any receipt at that time?

A. I don't remember signing any receipts.

Q. (Producing cash receipt to witness.) Is this your signature?

A. Yes.

Q. (Producing second cash receipt to witness.) Is this your signature?

A. That is mine; yes.

Q. Did you sign them on the 18th day of August, 1905?

A. Yes.

Q. You knew, did you not, that the commission was five per cent. for collection?

A. I don't know; I don't remember anything but just simply I remember six per cent. was all he charged me; five per cent. he never spoke about.

Q. Didn't they tell you that five per cent. was their charge on the gross account?

79 A. Six per cent. they were going to charge me for collecting the money.

Q. And that is all you know about it?

A. That is all I know about it.

The cash receipts, being for $267.73 and $1,125, are offered in evidence and marked Defendant's Exhibits G and H.

Q. (Handing witness check.) Is this your signature?

A. Yes.

Q. After looking at your signature on the back of this check, dated August 15, 1905, "Pay to the order of A. Fellerman & Son $3,000," and signed "National Discount Company," does that refresh your recollection as to whether or not a check was drawn and you asked that the National Discount Company should get the money for you, as you needed to pay a note on that day?

A. I don't remember anything about it, but I just said I should like to get the cash; that is all.

The check is offered in evidence. It is marked Defendant's Exhibit I.

Q. You testified something about a Gordon transaction?

A. Yes.

Q. You had a certain equity in the hands of the National Discount Company over and above the amount they advanced you; is that right.

A. Yes.

Q. That equity you on the same day assigned to Gordon?
A. Yes.
Q. Did the National Discount Company or Mr. Levison have anything to do with that assignment to Mr. Gordon?
A. No.
Q. Did they advise you to do it?
A. No.
Q. Did they know that you were going to assign it to Gordon?
Objected to.
A. No.
Q. Did you tell them?
A. I didn't tell them.
Q. You also testified about a Stich transaction that you had on the 18th; did they advise you about that?
A. No.
Q. Did you tell them that you were going to assign account to Stich?
A. No.
Q. And so far as you know they knew nothing at all about it, so far as you know?
A. No.
Q. You didn't tell them?
A. No.
Q. Isn't it the fact that these same accounts that you transferred to Stich you offered on the 18th of August, 1905, to the National Discount Company for an advance?
A. No.
Q. Didn't you come back again on the 18th of August, 1905, after you had got the thousand dollars in the morning, and tell them you needed more money, and bring them some accounts; didn't Mr. Levison, say to you that he would take those accounts but that he wouldn't advance you any money until he received confirmation from your customers of them?
A. He never mentioned a word to me, and I never went down to him again because he treated me unjust; he didn't give me the amount whatever the checks signed me; he made me sign checks and didn't give me either the amount of money; he made me sign for money that he never gave me. If you want to bring it out, bring out everything correct.

The COURT: Answer the questions that are put to you; if you want to make an explanation after that, counsel will let you make it.

Q. You are telling the truth, aren't you?
A. The truth.
Q. Did you ever offer those accounts to the National Discount Company, that you sold to Stich?
A. No, sir; never.
Q. Those accounts you sold to Stich the same day?
A. The next day.
Q. The next day?
A. Yes.

Q. Didn't you get the thousand dollars on the 18th?

A. Yes, sir, on the 18th, and I sold it to him on the 19th.

81 Q. So it wasn't the next day?

A. It was night-time.

Q. And it was night time that you sold the equity to Gordon?

A. Yes, because I didn't want to have anything more to do with Mr. Levison; he made me sign papers for money he didn't give me; that old man there (pointing to Mr. Levison).

Q. The reason you sold the accounts to Stich, and the reason you sold the equity in the accounts in the hands of the National Discount Company to Gordon, was because you didn't want to have anything more to do with Levison?

A. Yes.

Q. But at that time you had already consulted a lawyer, had you not?

A. Well that was also Mr. Levison's fault; he must have telephoned over to Leonard Bronner those things.

Counsel moves to strike out the testimony.

It is stricken out.

A. Because my whole trouble came on account of Levison.

The COURT: You pay attention to what I say or I will take steps to make you pay attention; you are to answer the questions that are put to you by the counsel, and you are not to go into these explanations outside.

Q. You have a great deal of feeling against Mr. Levison, haven't you; you feel angry at him? Do you understand my question?

A. Yes.

Q. Are you mad with him?

A. Yes.

Q. Did you at the time when you sold the accounts to Stich and transferred the equity to Gordon on the 18th, in the evening, had you at that time already consulted a lawyer?

A. I don't think so.

Q. When did you first consult a lawyer?

A. The lawyer, as I said before, he telephoned to me three days before.

Q. Three days before that?

A. On the 15th day he telephoned to me.

Q. So that on the 18th, by that time, you had already

82 seen a lawyer, Mr. Leonard Bronner?

A. No, not the 18th; Friday.

Q. Did you see Mr. Bronner before or after you sold the accounts to Stich?

A. After I sold the accounts to Stich.

Q. And before or after you sold the equity in the National Discount Company accounts to Gordon?

A. I don't remember whether it was after or before, it was the same day; I don't remember whether it was after or before.

Q. Did you see Mr. Bronner before or after you sold the equity of the National Discount Company accounts to Gordon?

A. Maybe I saw him before or after, I don't remember; that I don't remember positively whether it was the same day, maybe the same day in the afternoon or the next morning, I can't remember positively.

Q. You won't say, will you, that anyone recommended Mr. Leonard Bronner to you?

A. No, sir; no, sir; he called me up by telephone twice, one day after another.

Q. Before that time there had been someone acting as attorney for you, had there not?

A. Nobody; I never had a lawyer.

Q. Wasn't Mr. Woerbling your lawyer?

A. He wasn't a lawyer, he works in the law.

Q. Did you consult with him about your case?

A. No, sir; nothing at all.

Q. Did you speak with him before you spoke with Bronner about the case?

A. No.

Q. Did you speak with him after you spoke with Bronner about the case?

A. When I gave it away to Bronner then I told him.

Q. When did you tell him?

A. That was a Friday night when he came home, I told him what I did.

Q. Was he with you when you sold the accounts to Stich?

A. No, sir; I don't remember whether he was or not.

Q. Was he with you when you sold the equity to Gordon?

A. Yes.

Q. Didn't he witness your signature to the assignment
83 of the accounts to Stich?

A. I think he did; that was Friday night, as I said; that was Friday night.

Q. When you saw Mr. Levison on the 15th of August, 1905, did you know then that you were going to fail?

A. No.

Q. Did you have any idea then of failing?

A. No.

Q. Did you say anything about failing to Mr. Levison?

A. No.

Q. Did you say anything to him about that on the 18th?

A. I don't remember saying anything.

Q. Do you remember Mr. Max Solomon calling with you at Mr. Levison's place of business on the 15th?

A. I think so.

Q. Was that the first time you were there with him, or was it after you had been there once before?

A. The first time, I think so.

Q. Was Mr. Max Solomon present all the time you were talking to Levison?

A. No.

Q. How long was he there?
A. I can't remember.
Q. Did he introduce you to Mr. Levison?
A. I think he did; I am not sure; I think he did.
Q. Did you know Mr. Levison before you came there?
A. No.
Q. And Mr. Solomon brought you there because he knew Mr. Levison?
A. Yes.
Q. Then he must have introduced you to him?
A. Yes.
Q. What did he say?
A. I don't remember.
Q. Did he say anything about how much business you were doing?
A. I don't remember.
Q. You don't remember?
A. I don't remember whether he said anything about business.
Q. What did you tell Mr. Levison as to how much business you were doing at that time?
A. I never spoke anything about business; I only said I needed money; that was all.
Q. Didn't Mr. Levison ask you how much business you were doing?
A. No, sir.
84 Q. Didn't you tell him you were doing big business?
A. I never spoke about business.
Q. Did he ask you whether you were rated at Bradstreet's or Dun's?
A. He never asked me that; if he wanted to look me up he could look me up; he *he* didn't need to ask me.
Q. Did he ask you any questions at all about your business at that time or at any time in the month of August prior to the 19th day?
A. He didn't ask me any business matters.
Q. And you didn't tell?
A. I didn't tell; I simply told him I was hard up for money, and that I needed money to pay bills and for notes, and so on.
Q. That is all you said?
A. That is all I said.
Q. Can you think of anything else that you said to him when you saw him?
A. I never said anything to him.
Q. This thousand dollars that you say you got on August 18th; what did you do with that?
A. I don't know whether I deposited it in the bank or paid it out in the payroll; I don't remember which.
Q. But you paid it out?
A. I paid it out.
Q. You didn't keep a dollar of that for yourself, or from the creditors?
A. No.

Q. Do you remember testifying that you deposited it in the bank and you made out a check for the whole money; that you had borrowed some money from Mr. Levinne?

Mr. Elkus reads the witness his question and answer on page 80 of his former testimony.

"A. I loaned from him $1,250, when it was due.

Q. You borrowed $1,250 from him?

A. Yes, but I paid it; it was deposited in my bank and I made a check for the whole money.

Q. What you got from the National Discount Company, from Levison?

A. Yes, sir."

Q. Do you remember about that $1,250?

A. What $1,250?

85 Q. That you borrowed from Levison?

A. No, I got another note that was paid; that isn't the one.

Q. Did you borrow any money from Mr. Levinne to pay this $3,000 note that you say you paid?

A. I don't remember.

Q. Why don't you remember?

A. It is about another note.

Q. What note do you mean?

A. I had more notes; I don't remember when you say $1,250.

Q. You testified here that you borrowed $1,250 from him?

A. Yes.

Q. And you paid it back to him?

A. Yes, sir.

Q. And you said you paid it with the money that you got from the National Discount Company?

A. I don't remember saying that.

Q. Is it true that you did?

A. This is three or four years ago; I don't remember.

Q. I am asking you did you use that $1,250 to pay Mr. Levinne, and a portion of that money did you use that you got from the National Discount Company?

A. I don't remember.

Q. You won't say that you didn't?

A. I wouldn't say that I did.

Q. On the 15th day of August, when you first met Mr. Levison you say he told you that you should buy stock in the company?

A. Yes.

Q. How did he come to say that; what occurred at that time?

A. I suppose that was his business.

Q. Well, his business was cashing accounts; was it his business also to sell you stock?

A. He wanted me to become a member of the company, and he wanted me to buy shares.

Q. Did he ever meet you before?

A. No, I never saw him before.

Q. And the first time he saw you he asked you to become a member of his company?

A. I simply say that because he asked me to buy his shares; that is, be a shareholder in it, ain't it? That is a member.

Q. Can you tell exactly what he said to you?

A. He said—I told him about the money—what would
86 be with the money that remained with him, and he said: "You can buy shares of my company for the amount that would be left, and then you can transfer them afterwards to anybody that you want; they are good for anybody."

Q. At that time had you received the $3,000?

A. Yes, sir.

Q. Had you received the money, or were you waiting for the money to come back from the bank?

A. I was waiting for the money.

Q. And while you were waiting, you had this talk?

A. Yes.

Q. Did you ask him how business was?

A. No, I had no right to ask him.

Q. Did he tell you that business was good?

A. He told me that business was good.

Q. He told you that?

A. We didn't speak of business; he said: "If you want to have equity of your money to be sure of it, buy shares of my company; they are good, they are good for anybody; you can transfer them to your wife or daughter."

Q. Had you told him before that you were afraid somebody might take the equity away from you?

A. I don't remember that; maybe I did or maybe I didn't.

Q. You were afraid that you were going to fail?

A. No, I didn't mention that.

Q. Didn't you tell him then that you were insolvent, and you were afraid to lose the money?

A. No.

Q. Didn't you tell him before that you wanted to save this equity?

A. Maybe I did, but I don't remember.

Q. And maybe you didn't?

A. And maybe I didn't.

Q. And you want this jury to believe that without saying anything to him, he came up to you and said: "Buy stock in the company; you can save the equity that way, and you can transfer that stock to your wife or your daughter and save it"; was that
87 what he said?

A. I simply asked him about the money that I had to get from him.

Q. And he made that answer; you simply asked him what would become of the equity, and what did he say?

A. He told me, "Buy shares"; that is all.

Q. And what did you say to that?

A. I didn't need any shares. I didn't want any shares.

Q. So you didn't buy any?
A. No.

Redirect examination by Mr. ELKUS:

Q. You said that when Mr. Levison said to you he was only going to charge you six per cent., that you said that was very good, because that was all the bank charged?
A. Yes.
Q. Had you borrowed money from the bank?
A. Yes.
Q. And paid six per cent interest?
A. Yes.
Q. And that was all you had to pay?
A. That is all.
Q. On your note?
A. On my own notes.

Recross-examination by Mr. GAINSBURG:

Q. Had you ever before borrowed money and given your accounts as security?
A. Never.
Q. This was the first time you ever did it?
A. Yes, and I hope it will be the last.

By Mr. ELKUS:

Q. You borrowed money before without giving any security?
A. I borrowed it in my own name in the banks; thousands and thousands of dollars on my own signature.

ABNER WOERBLING, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. ELKUS:

Q. Do you know Mr. Fellerman, who was just on the stand?
A. I do, sir.
88 Q. Are you related to him?
A. He is my father in law.
Q. Were you present with Mr. Fellerman, Sr., at the office of the National Discount Company on the 18th of August, 1905?
A. I was at the offices of the National Discount Company on one day that I believe to be the 18th of August, 1905.
Q. Were you there on any occasion but once?
A. Just on one occasion.
Q. Do you remember whether the time you were was morning or afternoon?
A. To the best of my recollection, it was about noontime.
Q. Doyou remember what took place on that occasion?
A. Some transaction as to the transfer of accounts.
Q. Were some accounts transferred while you were there? Tell me what took place while you were there, or in your presence?
A. A check for a thousand and some odd dollars was made out; I believe Mr. Fellerman endorsed it.

A. A check or cash?

A. A check was drawn, and I belive he endorsed it, and some one procured the cash for him.

Q. When you say a check for one thousand and some odd dollars, what do you mean by some odd dollars?

A. I think it was in excess of a thousand dollars, but I can't tell you how much.

Q. Was it a thousand and one hundred, or a thousand and four dollars, or something like that?

A. Frankly, I don't recollect; it may have been about a thousand and one hundred; something of that sort.

Q. And the check was cashed; how much cash was given to Mr. Fellerman?

A. I didn't count it.

Q. You don't know how much was given?

A. I do not.

Q. Did you hear the conversation between Mr. Fellerman and Mr. Levison?

A. Part of it.

Q. What did you hear?

A. As to the amount in certain figures given as to the accounts assigned and the amount of cash given therefor.

Q. Tell me just what you heard?

89 A. I haven't any recollection of the subject, frankly; I know they discussed the assignment of certain accounts.

Q. What was said, if anything, with reference to the equity which remained after the assignment of the accounts?

A. Nothing was discussed about equity; Mr. Levison suggested that Mr. Fellerman invest in the stock of the National Discount Company.

Q. What should he invest in it?

Objected to.

A. Whatever equity he had he purchased the stock in the National Discount Company.

Q. Whatever equity who had?

A. The firm of A. Fellerman.

Q. Equity in what?

A. In the accounts that had been hypothecated.

Q. Was anything said by Mr. Levison as to what should be done with that stock which should be purchased with that equity?

A. No, not that I remember.

Q. Let me see if I can refresh your recollection; look at your statement and see if that does not refresh your recollection (handing witness paper)?

A. That is in accordance with my testimony.

Q. You say you don't recollect whether anything was said by Mr. Levison as to what should be done with the stock after Mr. Fellerman got it?

A. That is in my testimony.

Q. I call your attention to this part of your statement (indicating to witness)?

A. Well, I say in my letter that I got that information from Mr. Fellerman.

Counsel objects to the contents of the letter being stated.

The WITNESS: That wasn't said in my presence, though; that was information that I gathered from Mr. Fellerman that I submitted in the letter.

Q. Well, isn't it a fact—let me show you as to what you yourself said about the second interview?

A. That is right.

90 Q. What was the remedy; what, if anything, was suggested by Mr. Levison with reference to the disposal of such stock that was to be purchased?

A. I am giving you my best recollection now; Mr. Levison suggested that Mr. Fellerman could apply his equity in the purchase of the stock of the National Discount Company; that is all I know of the transaction.

Q. What was said about the disposition of that stock?

A. Nothing that I can recall now.

Q. What do you mean by your statement—didn't you make a statement under your own signature?

A. Yes, that is my signature and my letter (indicating).

Q. And Mr. Levison suggested the remedy for the disposition of the stock?

Objected to.

The COURT: He can refresh his recollection.

Objection overruled. Exception.

A. That remedy was suggested to Mr. Fellerman, but not in my presence; and the remedy I refer to is some information conveyed to me by Mr. Fellerman.

Q. When you say in this statement, "At this conference" (referring to the second amount on the 18th of August when you were present).

A. Yes.

Objected to as incompetent, irrelevant and immaterial, and as tending to contradict and impeach his own witness. Objection overruled. Exception.

Q. "At this conference Mr. Levison again suggested as a good means to dispose of the equity, that Mr. Fellerman purchase stock of the corporation."

Same objection, ruling and exception.

A. Yes.

Q. The corporation referred to was Mr. Levison's corporation, the National Discount Company?

A. Yes, sir.

91 Q. (Reading:) "And suggested the remedy for the disposition of the stock;" that all occurred at this same conference, didn't it?

A. I don't recall Mr. Levison suggesting the transfer of stock to anybody.

Q. What did you mean by that statement that at that conference Mr. Levison suggested the remedy for the disposition of the stock?

Same objection, ruling and exception.

Q. You admitted that yourself, didn't you?

A. Yes, I meant this; that at the conference that Mr. Fellerman had with Mr. Levison, Mr. Fellerman told me——

Q. I don't want to know what he told you, but I want to know when you dictated this statement yourself in your own words and in your own way, *that* when you referred to the second transaction on the 18th of August *that* your being present and you made that statement "At this conference Mr. Levison again suggested that Mr. Fellerman purchase stock of the corporation and suggested the remedy for the disposition of the stock," what you meant when you wrote that down yourself; if you didn't mean that you were present, and Mr. Levison suggested something about the disposition of the stock?

A. I don't now recall what that meant at that time; that was written over a year ago.

Q. When?

A. On April 11, 1907.

Q. A year and a half ago?

A. Yes.

Q. And your recollection, of course, was clearer then as to what took place in the preceding — 1905 than now?

A. Yes; but I was continually examined in reference to this proceeding.

Q. And, of course, you were very careful to say only exactly what took place?

A. That is why I don't want to tell you now what I don't recall.

Q. Do you mean to tell the jury now that your own words over your own signature, "And suggested the remedy for the disposition of the stock at this conference," doesn't refresh your recollec-

92 tion in the least?

A. It doesn't refresh my recollection to the extent of my remembering Mr. Levison's suggesting any remedy for the disposition of that stock.

Q. But you are clear that he did suggest to your father-in-law at the interview in which you were present that he, your father-in-law, or his firm, purchase stock in Mr. Levison's company for the equity in the accounts which had been signed?

A. Yes, sir.

Cross-examined By Mr. GAINSBURG:

Q. You are clear about that?

A. I am quite clear about that.

Q. Now that Mr. Elkus has found that your memory fails you on one thing, let us see if I can't find your memory failing on another matter; you are sure that that statement was made by Mr. Levison on August 18th?

A. On the day that I was there.
Q. And you were there on August 18th?
A. I believe that was the day.
Q. Because on the day after the petition was filed against your father-in-law's firm?
A. That is right.
Q. And that day you were very busy?
A. What day?
Q. That August 18th?
A. I was kept busy.
Q. You took your father-in-law up to Mr. Stich?
A. I did not.
Q. Weren't you there?
A. No, sir; I was not in his office.
Q. Where did you witness the assignment of accounts that was made to Mr. Stitch?
A. That was witnessed uptown.
Q. At your father-in-law's house?
A. No, sir.
Q. Where?
A. In a restaurant uptown.
Q. Was that the same restaurant that Gordon got his equity in?
A. No, sir.
Q. That was another saloon or restaurant?
A. That was in, I believe, the Continental Hotel.
93 Q. You were present at both times?
A. Which times?
Q. When you witnessed the signature of your father-in-law to the assignment of the accounts to Stich, and when you brought the paper for your father-in-law to sign to sell the equity to Gordon?
A. Yes.
Q. And you recall now that it was on that day that Mr. Levison stated to your father-in-law that he should purchase stock in the company for the equity?
A. Yes, sir.
Q. You were present in Court this forenoon?
A. Yes, sir.
Q. Did you hear your father-in-law testify that Mr. Levison said nothing to him about any such purchase of stock on this second visit?
A. Yes, I heard him testify and contradict himself on a couple of occasions.
Q. Does that answer my question?
A. Yes.
Q. Did you hear him testify to that?
A. I heard him testify to that and to other things, too; I have heard him testify both ways.
Q. Which way is correct?
A. My testimony is absolutely correct.
Q. Between August 15th and August 18th had your father-in-law informed you of the conversation that he had with Mr. Levison?

A. The first I knew of Mr. Fellerman's difficulties was about noon of August 18th, 1905.
Q. You were then his son-in-law?
A. No, I wasn't his son-in-law at that time.
Q. So your father-in-law hadn't spoke to you about the assignment of accounts to the National Discount Company?
A. I never knew of them until the morning of August 18, 1905, and I wasn't conversant with any of his affairs until that time.
Q. At that time did your father-in-law bring with him accounts to be assigned to the National Discount Company?
A. If he did, I did not see them.
Q. Did he send out to have the statements brought to him?
A. Not in my presence.
94 Q. How long did you stay there?
A. Oh, about twenty minutes.
Q. When was that; what time of day?
A. You fix it as August 18th, and it was the day before the filing of the petition and I believe it was filed on the 19th.
Q. What time of day?
—. About noon.
Q. Did you then know of the probability of a petition being filed against him, or of his insolvent condition?
A. I knew that, of the insolvent condition.
Q. Did you tell Mr. Levison anything about it?
A. No, sir.
Q. Did you hear your father-in-law say anything about it?
A. No, sir.
Q. Don't you recall that when your father-in-law and you and he came there that he didn't bring the accounts with him and that you and he waited until some one was sent to your father-in-law's office and the accounts were brought to the National Discount Company?
A. That may be true, but I have no recollection on that subject.
Q. Will you tell the jury the circumstances under which you say Mr. Levison came to ask your father-in-law to purchase stock in the company?
A. I don't recall the conversation that led up to it.
Q. Do you mean to say that the only recollection you have on this subject is that Mr. Levison told your father-in-law or asked him to buy stock; you don't know what led up to it?
A. I don't recall the conversation that led up to it.
Q. And you don't know what followed?
—. I don't know what followed.
Q. You do know, however, that he didn't buy stock?
A. Yes, I know that.
Q. Did you advise him not to?
A. Yes, sir.

Redirect examination by Mr. ELKUS:

Q. You were asked by the distinguished counsel whether
95 you found out that your father-in-law's firm was insolvent; when did you find that out?

A. At twelve o'clock, August 18th.
Q. He told you?
A. As informed from the statement of Mr. Fellerman.
Q. When?
A. The statement he made to me; I was informed that he was insolvent; he made this statement about noon on the 18th instant.
Q. Where were you when he made that statement?
A. I believe in my office.
Q. Was that before or after you had been with him to Mr. Levison's office?
A. Before; we went from my office straight to Mr. Levison's.
Q. So that you knew, and Mr. Fellerman, of course, knew, that at the time he was dealing with Mr. Levison that he was insolvent, and that there was bound to be a failure?
A. Well, I knew it, yes.
Q. Didn't you tell him so?
A. I asked him if he could—if he had enough to pay his creditors in full, and he told me he hadn't.
Q. You knew that there was going to be a bankruptcy?
A. Well, I expected it.
Q. You expected it the next morning when it came?
A. Yes, it wasn't a shock or a surprise.
Q. And you told your father-in-law that it would happen, didn't you?
A. I told him to expect it.
Q. On that occasion when you went to Mr. Levison's office with your father-in-law were these things fresh in your mind; did Mr. Levison say anything to you or to your father-in-law about his financial condition; did he say, "How much are you worth?"
A. No, sir.
Q. Did he say, "Why are you selling these accounts?"
A. No.
Q. Why are you borrowing money on these accounts at this extortionate rate of interest?

Mr. GAINSBURG: I object to the word extortionate, and ask the Court not to allow the question.
Question withdrawn.

96 Q. Did he ask you, or your father-in-law in your presence, anything at that time with reference to his business, or the transaction of his business, or what was transpiring or going on?
A. No, sir.
Q. Did you know that your father-in-law had been to see Mr. Bronner?
A. I knew it at the time he called at my office.
Q. He told you what happened?
A. Yes, he told me how he came to call at Mr. Bonner's office.
Q. Just as he told it here?
A. Just as he told it here this morning.
Q. Did you tell that to Mr. Levison?
A. No, sir.

Q. Did you ask Mr. Levison whether or not he had told Mr. Brouner to call up your father-in-law?
A. No.
Q. Nothing was said about that at all?
A. No.
Q. As you recollect it, the entire conversation was the transfer of the accounts and this talk about the stock?
A. That is all.
Q. Is your recollection refreshed as to Mr. Levison's saying anything to you about what could be done about the stock?
A. Mr. Levison didn't direct his remarks to me; he addressed Mr. Fellerman.
Q. But you have stated all, haven't you?
A. Yes, but you asked if Mr. Levison said it to me.
Q. We will change the form; whether he said it to you, or in your presence, of what should become of the stock after it was purchased by Fellerman?
A. No, sir, not that I recollect.
Q. Your mind at that time, and Mr. Fellerman's mind, were more or less directed to saving what could be saved out of the wreck that you knew was going to take place?

Mr. GAINSBURG: I object to calling for the operation of the mind of this witness.
Question withdrawn.

Q. Mr. Levison knew you, didn't he?
A. No.
Q. *Did* you introduce yourself as what?
A. I introduced myself as Mr. Woerbling.
Q. In what capacity?
A. That is all, or Mr. Fellerman's advisor.
Q. Or Mr. Fellerman's advisor?
97 A. No, I just wanted to see what he was getting and what he was selling.
Q. At whose request did you go there?
A. Mr. Fellerman's.

Recross-examination by Mr. GAINSBURG:

Q. You didn't tell Mr. Levison that you were a law student, or a lawyer, or a prospective lawyer?
A. No, sir.
Q. And you didn't participate in the conversation?
A. Absolutely not.
Q. Do you remember at that time that there were statements made about these accounts, and Mr. Levison and Mr. Fellerman figured out what the six and five per cent. were, and checks were drawn and so on?
A. I have no recollection about that.
Q. Do you remember seeing statements of this kind prepared and figured out?
A. No; there was a lot of papers on the desk, but I don't remember

what they were, and this paper (indicating) doesn't help my recollection at all?

Q. Did you see Mr. Fellerman sign any papers there?

A. Yes, he signed.

Q. Did he sign receipts?

A. The only recollection I have of his signing anything was a check and a contract; a printed assignment,

Q. You don't mean to say that this paper was signed when you were there on that day?

A. A paper like that was on the desk.

Q. This is dated August 15th?

A. A paper like that was on the desk.

Q. Did he sign a paper like that?

A. I don't recall whether he signed it, or whether I saw it signed; I saw a paper like that on the desk.

Q. You won't say that a paper like that wasn't signed at that time?

A. Oh, no, I don't say that.

By Mr. ELKUS:

Q. You had considerable experience at that time with bankruptcy matters, hadn't you?

A. Some.

98 Q. You had been rather active in that regard?

A. Quite.

By Mr. GAINSBURG:

Q. How did you come to write a letter to James, Schell & Elkus? (Producing letter to witness.) Did you write this letter to James, Schell & Elkus, at the request of Messrs. James, Schell & Elkus?

A. At the request of Mr. Rosenberg; he had been examined so many times he wanted my experience in this proceeding, and I incorporated it in that letter.

Mr. LEVIS: I offer in evidence the original assignment sheets of the National Discount Company, showing the accounts assigned to the company by A. Fellerman & Son, aggregating in the first assignment $5,232.39; also the original assignment sheet of the second assignment showing the amount of the accounts assigned to the company by A. Fellerman & Son, aggregating $2,495.50. There is also a tabulation of the net amounts; deducting the amounts from those amounts; there is $5,025.45; then the second assignment, the net amount after deducting the discount is $2,379.30.

Mr. GAINSBURG: Weren't there some other statements attached to those?

Mr. LEVIS: No, that is all that was attached to the original statements, as I got them.

The assignment sheets above referred to are offered in evidence and marked Plaintiff's Exhibit 11.

Mr. LEVIS: Reserving the figuring of the amount of interest on this claim, plaintiff rests.

Mr. GAINSBURG: I move to dismiss the complaint of the plaintiff upon the ground that he has failed to make out a cause of action. I ask leave of the Court to hear me at length, because upon a careful summary of the evidence given here, even if it should be be-
99 lieved, and bearing in mind the allegations of the complaint, being the charges made against the defendant here, it must conclusively appear that the plaintiff has not made out a *prima facie* case.

The charge here is set forth in Par. 8; all the preceding and succeeding paragraphs dilate upon it; and some are merely introductory. It is as follows:

"On information and belief that the said agreement, 'Exhibit A,' and said transfers of accounts made thereunder, were made with the intention on the part of said bankrupts and in pursuance of a fraudulent device and scheme on their part to hinder, delay and defraud their creditors, and were a part of a fraudulent scheme and conspiracy entered into between them and the National Discount Company thereby to hinder, delay and defraud creditors of said bankrupts, and said National Discount Company had full knowledge of said fraudulent intention and was not a purchaser in good faith of said accounts."

The charge, as I understand it, is one of conspiracy, that the conspiracy was entered into between Fellerman & Son and the defendant, National Discount Company, to defraud Fellerman's creditors.

Now in order to establish that conspiracy, they must show 1stly, some act in furtherance of such a conspiracy;

2ndly, they must show that legal fraud or injury followed from this. They must show first the conspiracy; then the act consummating it, and third, the damage flowing therefrom.

As to the conspiracy itself, all that we have here from the testimony of their witnesses, is that an agreement was made whereby Fellerman & Son tran-ferred certain accounts to the National Discount Company, and received advances thereon.

The equity was the property of Fellerman, and was subse-
100 quently turned over to the trustee. The agreement further provides for certain charges and commissions to be paid to the defendant.

That, in itself, is clearly not an act of conspiracy. The transfer under that agreement does not prove a conspiracy between Fellerman & Son and the National Discount Company.

The moneys were advanced. It is claimed in the complaint that the plaintiff, or A. Fellerman & Son were insolvent at that time; they have to show in order to bind us with a fraudulent intent on the part of Fellerman & Son, that such knowledge of insolvency, if it did exist in the mind of Fellerman, was conveyed to us; in other words, that at the time he came to us he not only had this fraudulent intent but that he conveyed that knowledge to us either by act or word.

Now there isn't a scintilla of evidence to that effect. On the contrary, the evidence here is:

"Q. Did you then know that you were insolvent?

A. No.

Q. Did you then contemplate insolvency?
A. No.
Q. Did you know that you were going to fail?
A. No."

Your Honor may say that his answers upon cross-examination does not overcome his testimony upon the direct; but there is no evidence upon his direct of any such knowledge on his part, or of the conveyance of such knowledge to Mr. Levison.

On the contrary, it appears that he told the National Discount Company that he was short of money in the bank, and needed money; not for the purpose of defrauding creditors, or delaying or hindering them; but for the purpose of paying the creditors; and the evidence of the plaintiff's own witnesses is uncontradicted that the first $3,000 obtained upon the assignment of these accounts from the National Discount Co. was deposited in the bank of Fellerman & Son, and used by them to pay a note, one of their obligations.

101 Now the legitimacy of that obligation is not attacked, because if they should say that that was in furtherance of the conspiracy, they must further establish that the money so paid was not paid a bona fide transaction; but there is no such proof.

We have proved by his former testimony that the other thousand dollars was also deposited in his bank account, and used for the purpose of defraying and meeting firm obligations, so that I submit that not only is there no scheme or conspiracy established, but that there is no act of wrongdoing established, and the evidence is proof conclusive that the moneys given to Fellerman & Son, as appears from their statement, was used by them for the purpose of defraying obligations, and was actually used in payment of bona fide obligations, the obligations themselves not having been questioned.

It is true they claim that Mr. Levison suggested that he should use the equity for the purpose of buying stock in the corporation. It is equally true that that was never consummated; but the charge in the complaint is not that this was a fraud or part and parcel of a scheme to defraud; the charge is that the original agreement entered into on the 15th day of August was the fraudulent scheme, and that that was part and parcel of a conspiracy, to sustain which there isn't a single word of evidence in this case.

Now I submit that it is necessary for them to establish these elements before your Honor can allow this case to go to the jury upon any view of the case.

This action is brought under Section 67E of the Bankruptcy Act. That provides:

"That all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act, subsequent to the passage of this Act, and within four months prior to the

102 filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered

as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the Bankrupt."

His Honor Judge Hough, in a case in which James, Schell & Elkus participated, the case of Wright vs. Sampter, held that that Section did not change the rule of law applicable to fraudulent transfers in this State; this transaction occurred in the State of New York, and, in order to establish the existence of a fraud, it is necessary not merely to show a fraudulent intent on the part of the transferer, they must go further and also show one of three things: First, that the transferee had knowledge of the fraudulent intent; or that the transferer participated in the knowledge; or that the
103 transferee, from facts brought to his notice, was put upon inquiry, which inquiry led to the discovery of such a fraud.

It is necessary for them to show one of these three things in order to entitle them to go to the jury, and they have not done so.

Even if a fraudulent intent did exist in Fellerman's mind, it was not conveyed to Mr. Levison by the mere statement "I am short of money," and it was not carried out by Mr. Fellerman himself, because he used these moneys to pay obligations; if the payment of these obligations worked a preference, and if thereby one creditor was preferred over another creditor, I respectfully submit that is not the foundation for an action of this kind.

There is no proof in the case that we intended to assist Fellerman with the use of that money to pay off an obligation for the purpose of delaying or defrauding other creditors, because it is necessary for them then to show that the payment made to these persons—that they were not creditors—and that it was done with the defendant's participation therein.

It is not sought in this action to recover these moneys paid to these creditors; it is sought to penalize the National Discount Company to the extent of over $4,000, on the charge of conspiracy, and nothing else. They have not shown that the National Discount Company participated in a fraud. There is not a scintilla of evidence to that effect.

The contract is in evidence, and in the course of his cross-examination Mr. Elkus referred to that contract as extortionate; and possibly it may be that his claim here is that because the contract,

which he considers to be extortionate, is a foundation for the claim, that a conspiracy was entered into.

I respectfully submit that if any charge is made in that contract, or by reason thereof, it is extortionate, unreasonable; that is a matter for an action for an accounting, and that cannot be the basis
104 for an action by a trustee upon a charge of conspiracy and fraud.

That is an entirely different issue, and that only was in the mind of the trustee when he received the $767 is evident from the letter which they introduced in evidence, and from the copy of a letter which Mr. Levis gave to your Honor, wherein the Trustee says that this money was received without prejudice, to an accounting from the National Discount Company.

Now an accounting does not mean charging the Company with a fraudulent agreement or a conspiracy to defraud the creditors of Mr. Fellerman, or that they and Fellerman entered into a conspiracy to take these moneys from the proper persons, to be used for the benefit of Fellerman or turned over to third parties for Fellerman's benefit.

It does not justify the trustee in coming into Court here and making these accusations without proof.

I further say that there aren't any facts or circumstances adduced here sufficient in themselves to have put the National Discount Company upon inquiry which might lead them to a discovery that there was such a fraudulent intent on the part of Mr. Fellerman. The facts here simply are that Mr. Solomon, a director of the National Discount Company, brought this gentleman to the National Discount Company, and then a transaction was entered into and an agreement signed, the accounts turned over to the National Discount Company and advances made thereon. Nothing to indicate that it was a fraud. Fellerman came on the 15th of August and asked for advances and received them, and on the 18th he came again with another batch of accounts and received his further advances. The mere fact that on the 19th a petition in bankruptcy was filed against him, and that Mr. Bronner consented to the adjudication without knowledge thereof being imparted to us, or any facts being brought home to us,
105 that such bankruptcy proceeding was imminent, cannot be held that we should have been put upon our guard, because we were not informed of this man's condition at that time; and the mere statement that he told the National Discount Company that he was short of money and borrowed therefor, when followed by the actual act of depositing the money that he received in the bank and drawing these moneys for the purpose of paying obligations, not attacked by the trustee, is not proof that we had anything whatever, any inkling, any act or fact which could put us upon our inquiry or on our guard, and which would lead us to believe that there was a fraudulent scheme being hatched in the mind of Fellerman.

We claim that this was a bona fide transaction, and was based upon a present fair consideration. We claim from the evidence adduced here that the bona fides of the National Discount Company was not attacked or attackable; that it was not a purchase of the accounts; that moneys were advanced on these accounts and that the equity be-

longed to Mr. Fellerman, and that the National Discount Company did not dispute the payment of these moneys and the turning over of the surplus of uncollected accounts to the trustee; and, therefore, we fall within the authorities where, in the absence of the proof that it was not made for a present fair consideration, no case had been made out.

That is the charge here. A conspiracy was entered into to defraud Fellerman's creditors, and I submit that there is no proof of any conspiracy or any act in furtherance thereof, and that there is no proof that by any conspiracy or act committed after the agreement was made was there any legal damage or injury resulting to this estate.

If these creditors have been preferred, that is another matter for the trustee, there is some testimony here that upon one of the notes paid in the Oriental Bank, upon which a Mr. Levinne, whom Fellerman says he doesn't know, whether it was his nephew or his son-in-law or his brother-in-law, yet there is no proof in that case of
106 the knowledge of the fact was conveyed to Mr. Levison. All he said to the National Discount Company was "There is a note in the bank to meet to-day; I want to meet it." That is surely not a fraudulent act. Assuming for one moment that any reliance can be placed upon the self-confessed and much perjured testimony of Mr. Fellerman, if it can be taken at all into consideration, no cause of action has been established upon the allegations in the complaint, and I submit that the complaint should be dismissed.

The COURT: I should like to hear you, Mr. Levis, on the fraudulent conduct of Mr. Fellerman; where is the evidence that Mr. Fellerman knew or had reason to suppose——

Mr. LEVIS: I assume that the case has shown clear enough the fraud on the part of Fellerman; it isn't incumbent upon the trustee to say that Mr. Levison, of the National Discount Company by actual words became a part of the fraud that was being perpetrated. I assume that all that is necessary for the trustee to show is facts to point to a fraudulent knowledge, or which point to the fact that the National Discount Company had reasonable cause to believe that a fraud was being perpetrated in this case.

The evidence shows in the first place, at the very outset, the agreement itself that was made with this man, who on his own testimony could neither read nor write, and who said that the only thing he heard of was a six per cent. interest item; the agreement calls for not alone six per cent. interest, but five per cent. for collection. When your Honor considers that the accounts which are offered in evidence in this statement, are 60-day and 30-day accounts, your Honor can appreciate that five per cent. for collection of those accounts running only for sixty days, not conveyed to the knowledge of this man at all, is in the first place showing that he was being over-reached; the five per cent. is upon the gross of the accounts, and such is
107 the contract, and not upon the net accounts.

Now, didn't Mr. Levison appreciate what was going on? Why did he send his bookkeeper up to go over the books of Fellerman? Why did he make an agreement which says, "I will cash all

your outstanding accounts," and then send the bookkeeper up to look over the books, and he knew from looking over those books all the accounts which Fellerman had, and the total of his property was laid bare before Mr. Levison's representative; and certainly the knowledge of that agent is the knowledge of his principal.

The mere fact that Mr. Levison didn't say, "How about your creditors" doesn't make any difference. It was the duty of Mr. Levison when he found the man selling very quick asset he had by agreeson when he found the man selling every quick asset he had by agreement, when he sent up to look over the books it was his duty to have asked, "What are your creditors? Why are you selling everything to me except your merchandise?" But he didn't do that. When he came to advance the money even he wasn't honest with the man. He assented to the transfer, and the statements which he offered in evidence over his own signature, are that he advanced $4,475. Mr. Fellerman has testified that every cent he received was $4,000. Why did he make this man sign receipts for more money than he actually received? Why, if he had no knowledge, or reasonable cause to believe what was happening, did he deal with this man in the shape of cash? What should he infer from a statement of a man who was selling every quick asset he had, when that man asked him for cash; not checks.

He knew this man was a business man, and he could have deposited his checks in the bank, and when a business man does as Fellerman did another business man commences to think there is something to look into. Why was Mr. Levison so silent in the face of all these circumstances? Why didn't he ask what is your con-
108 dition; why do you come to me with all your assets? He never asked him that; Fellerman never told him.

Of course your Honor doesn't expect that Fellerman walked into the office of the National Discount Company and said, "I am busted; help me break my creditors." Any such situation Mr. Levison wouldn't become a party to; he wouldn't dare. But it is the secret plan; the realization that this man is absolutely in his power by the making of an agreement of this sort.

Then he takes receipts for more than is actually delivered from this man who can't read or write, and then he commences his extortionate plan of an extra charge item that the man knew nothing about; and finally, when he tenders back to the trustee in bankruptcy what he regards as surplus, he has collected the beautiful sum of 20% for forty days, 120% a year.

Now so much for the mere inference that can be drawn by Mr. Levison's failure to ask any questions. That Mr. Levison realized what was happening after he sent his bookkeeper up and got his accounts back and gave the man money, appears from this shrewd little conversation, and your Honor will remember that that conversation was the second time that day, when the $3,000 was handed over after his bookkeeper had gone up and taken off those statements, and seeing this man's condition. What was said? He said he had better take stock in the National Discount Company for that equity. That, of itself, would mean nothing, but he said—and here is the

meat of the case and the fraud of the National Discount Company—"You can transfer that to anybody; your wife or your children." The man with the fraud that was in his mind, there was the suggestion, for him to deal with Mr. Levison. "You had better take the stock in this Company; you can transfer it to anybody you choose; your wife or your children." That is what Fellerman was trying so do. That was what he had in his mind; to take care of his
109 relatives as opposed to all the great body of his merchandise creditors; and here is the man who helps and furthers and carries out that suggestion; and then they say that there was nothing to put him on reasonable notice. The mere fact that Fellerman didn't buy that stock plays no part in the situation; that shows what was in the mind of Mr. Levison. He had a man that he could overreach here. He was feeding his mind with these doubts, and in the meantime taking receipts from him for more than the cash he advanced, when the man could not read and write, and they tell us that it was a present fair consideration.

He made an agreement with this man orally to give him 75% of the accounts, and when he gave him the last time $2,500 worth of accounts, he gave him $1,000; that is the uncontradicted testimony. The first time he gave him $3,000 for $5,200 worth of accounts; where is the fair dealing that they are telling of? Isn't there a fair showing on the plaintiff's case of an intention to overreach, with a reasonable cause to believe something was going to happen?

The COURT: If he advanced him less than he agreed to, Mr. Fellerman would be entitled to whatever he collected on the accounts over the advance.

Mr. LEVIS: If your Honor please, that is true; but in the first place, the claim that he will hold upon Mr. Fellerman, will not be for the actual advance, but for a surplus which Fellerman knew nothing about; and the signing receipts for more than was due.

And the second proposition, instead of being an ordinary advance loan, there was an overreaching agreement of an extra five per cent. unknown to this man.

And lastly, and what the trustee relies upon, does your Honor mean to say that if I, as a party to a fraud with a reasonable cause to believe that a fraud is meditated, loan money to a man so as to permit him to defraud, that simply I loaned, am I let out of the
110 situation? If I loan money, suspecting that the money that I am loaning is going to be used as part of a scheme, I am actually responsible, and when I take security in full, and thus convert a dead asset into a quick asset, and become a spoke in the wheel of fraud, I am not let out merely because I loaned as opposed to an actual purchase.

The COURT: It is not a sale in the case of defrauding creditors his turning out property for a song, but it is a loan on security, and whatever is exacted over and above the amount of the loan comes back to Fellerman.

Mr. LEVIS: That is perfectly true, but it comes back how? With extra charges and with interest at 160% deducted.

The COURT: That would be nothing but a fraud between the two.

Mr. LEVIS: It is a fraud between the National Discount Company and Fellerman, and certainly the rights of Fellerman; it passes to the trustee in bankruptcy, and the trustee says that the agreement, your Honor, will see that the amount that was to be charged here is written in in ink, it isn't in the original agreement in print, there is a five per cent. charge written in there in ink. It is not the usual one of two per cent.

The COURT: That might give rise to a suit by the trustee to the Company for over-charging.

Mr. LEVIS: It is one of the things that show fraud.

The COURT: If the National Discount Company believed that this was a cleaning out of his accounts for the purpose of defrauding his creditors, the fact that that might explain their making such terms.

Mr. ELKUS: That is the whole point; it is one of the insignia of the whole matter. That whole proof goes to show that the defendant knew that because of the nature of the transaction he could make the extortionate charge that he did. That is simply a circumstance of the proof of the case. In the first place the testimony of the plaintiff, undenied, which taken at its full worth now is that this man
111 Fellerman went there with the knowledge derived from Woerbling, a man skilled in bankruptcy, that not only was he totally insolvent, but that he was going to become a bankrupt. What was there in the transaction is the first question which would lead Mr. Levison to have reasonable notice as a reasonable man that he was a participant in a fraud? First, this: Fellerman says, "I could have all the money I wanted at six per cent. from my bank without security." It is fair to assume that a reasonable man would have found that out without much trouble, and a man in the business of discounting bills could find it out with less trouble than an ordinary man.

Now the next thing is this: He asks and receives, according to his story, what? A pretended loan of money of so much in cash, taking receipts for a larger sum than was paid; charging commissions which the man himself says he didn't understand, were to be paid by him, which amount to a tremendous sum per annum at the rate of interest; all the insignia of fraud. And then followed up by this: conceded bankruptcy and conceded insolvency and conceded intent on the part of Fellerman to cheat his creditors by paying his brother-in-law or son-in-law's note, so as to escape that liability. No way of it being done except by some means such as this, and Levison, participating in it to the extent that he must have known of these transactions, and we have the fact that Levison knew that there was a scheme on foot to defraud creditors.

Mr. Fellerman says something of equity in the account; and right here I would call your Honor's attention to the fact that the five per cent commission was to be charged not on the amount advanced, but to be charged on the entire sum of the accounts, so that if the accounts transferred were $5,000, and the amount advanced was $1,000, they would still be entitled to a commission on $5,000, no matter for what period the sum was advanced. These are
112 only insignia of a transaction which is in its nature fraudulent, because of those facts; but in addition to all that, we

have Mr. Fellerman being advised by Mr. Levison—because you can't take it to be anything more or less than that—that if he wants to be can take stock in his Company, the National Discount Company, and transfer it to his wife or children; and then it cannot be traced or found out. And this conversation takes place after Mr. Levison's bookkeeper or secretary of the Company had been to the Fellerman's place of business; had gone through the ledger from beginning to end; had cleaned it out of every account that was worth taking, and then comes back to Mr. Levison and he says, "Mr. Fellerman, about the equity, take the stock, and you can transfer it to your wife and daughter, and it can't be traced." If it was an honest transaction why should he want to take stock or why should he say, "I am pressed for money by my creditors; I need money for that"; and then Levison comes up and looks at his books and comes back with all the accounts—the secretary of the Company—and then he says on top of that, "You take stock in my Company, and I will show you how to hide it from your creditors; I have helped you put through one transaction, by which you have been able with my help to get money for an estate upon which you could not realize, and your Receiver or Trustee in Bankruptcy will get for all your creditors—we only get his share—I have shown you how to do that, and now I will help you if you will take my stock; take the equity in these accounts, and protect them in the same way, and give them to your wife and children."

Could there be any more potent circumstance to show notice and knowledge on the part of Mr. Levison? It is notice and fraud brought home to Levison which made him a party to the transaction by which the fraud was consummated.

It is after all only a question of fact, and all the testimony
113 can be read before the Court, and your Honor can decide later whether the facts are sufficient to go to the jury.

Of course your Honor knows a fraud is really susceptible of direct proof; it must be by these circumstances and these inferences that are pieced together and drawn out from unwilling witnesses—and the circumstances in the case, like this terrific overcharge, that must create in any unaffected mind the irresistible impression and conclusion that no man could participate in a transaction of that kind unless it were for some fraudulent purpose. If a man comes to a jeweller in diamonds, with a ring which is worth $5,000, and says, "I will sell it to you for a hundred dollars." Without any other word, anybody who bought that ring with knowledge of that fact would know that there must be some circumstance connected with it that would put him on his guard.

It seems to be, that in view of all the circumstances, it is a question of fact for the jury. And the point here, is, did Mr. Levison have from these facts reasonable ground for suspicion to believe that he was participating in a fraud. There is his own statement uncontradicted. If he wasn't taking part in a fraud, why should he have advised this man to take the stock in his Company, to pass over to his wife and daughter? And whether it is a loan or a sale, I don't think makes any difference. That is a mere matter of form.

Mr. GAINSBURG: Comment has been made upon testimony adduced here that the defendant had knowledge, or reasonable cause to believe that a fraud was in the mind of Fellerman, in that Mr. Lewis, the agent of the National Discount Company, called at the office of Fellerman & Son to mark the accounts that appeared upon his books, and which were transferred to the National Discount Company. Your Honor, in looking at the agreement, will find a provision which
114 makes it necessary for the National Discount Company to do so, that those accounts transferred to the National Discount Company, should be so marked in the books of Fellerman & Son that they were no longer the property of Fellerman & Son, to the extent of the advances made thereon by the National Discount Company.

Surely not evidence of a reasonable cause to believe fraudulent intent; but evidence on the part of the National Discount Company of an act in furtherance of a *bona fide* transaction made in the ordinary course of business.

I refer to the paragraph before Eleventh in the agreement:

"The customer agrees that any account transferred to the Banker will have this transfer properly entered in his ledger stating that this account is the property of the National Discount Company."

The COURT: But incidentally in doing that the man that went there ascertained that all the bankrupt's accounts which were good for nothing were being sold; the natural inference, when a merchant sells out all he has at one time——

Mr. GAINSBURG: But did he? It appears that two or three days thereafter Fellerman brought additional accounts to the National Discount Company and that on the same date he sold $3,000 worth of other accounts which had never been offered to the National Discount Company; now even if they were in the books and were seen by Mr. Lewis, and even assuming that he had transferred all of the accounts, as the agreement provides that Fellerman & Son should transfer all of their accounts; that he should do his entire banking with the National Discount Company; it says that he shall transfer all of his accounts for the purpose of receiving advances thereon, the claim that the National Discount Co. thereby became acquainted with the condition of Fellerman & Son is not substantiated by the
115 proof, because Bella Fellerman testified in answer to Mr. Lewis' question as to whether or not he at that time looked at the ledger or other books, that he did not; and she said all the books that he looked at was this book containing the accounts, and nothing else. That this book did not contain the firm obligations.

Surely that is not evidence of knowledge or reasonable cause of Fellerman's intention of fraud. It is true that you cannot prove a fraudulent transaction by direct and immediate evidence; but it is also true that there must be proof of fraud: that it cannot be determined merely by suspicious circumstances from which there may be a doubt created in the mind of your Honor and the minds of the jury. There must be conclusive evidence that a fraud has been committed. That is not so here.

Mr. Elkus comments upon the charge of 5 per cent. If there was a conspiracy, as charged in the complaint, what becomes of this conspiracy in the face of Mr. Fellerman's testimony, when he says he didn't know and wasn't informed anything at all about this five per cent. charge? Does that tend to establish a conspiracy hatched between two parties?

The COURT: I think the case should go to the jury and I deny your motion.

Defendant excepts.

Defendant's counsel opens his case to the Court and jury.

Mr. GAINSBURG: It is not necessary for me to tell you at length what this case is about; it is a simple matter for a man to come here and accuse, even by such evidence as you have heard—accuse another man of fraud; particularly of a conspiracy, and, as you know, a conspiracy is not hatched with shades drawn up or in the presence of witnesses; but it is usually hatched between two persons; no one is present or supposed to participate in it. And when a man comes into court and says, "I conspired with John Jones and we did a certain thing," all that John Jones can say in his defense is to say that it is not true, and that is the defense here; that whatever
116 conspiracy is claimed to have been committed here is without any foundation of any kind whatsoever. The fact is that this was an ordinary business transaction, similar to those which had been done by the National Discount Company during the five years they had been in business. The contract is one of the regular printed forms of agreement; it will also be shown to you that in the years 1905, 1906 and 1907, and down to the date of the trial, accounts were rendered; statements were given to the trustee; James Schell & Elkus and Stern, Singer & Barr, and to all parties who had the slightest interest in the matter. It will also be shown to you that the sole evidence given on the behalf of the plaintiff of a fraud, of a conspiracy, Fellerman's is absolutely without foundation or support; this was one of the ordinary business transactions entered into between Mr. Levison and A. Fellerman & Son; they had no knowledge of any contemplation of failure; they had no knowledge of insolvency; did not assist him to defraud his creditors; because the money was used in paying off creditors, and didn't do the slightest act that would justify you to penalize the National Discount Company to the extent of $4,000 which went not into the pockets of A. Fellerman with the consent and approval and instigation of the National Discount Company, but went from there to Fellerman's bank and paid out by him to other people. And for whose protection the money was paid was not disclosed to the National Discount Company, and there is not a scintilla of evidence in this case to show that the National Discount Company was a party to any fraud to defraud the creditors. You are to decide this case upon the evidence, and not upon any sympathy which you may have with creditors who have lost money in a manner no way connected with us.

117 *Testimony for the Defendant.*

LEONARD BRONNER, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. GAINSBURG:

Q. You are an attorney and counsellor at law?
A. Yes, sir.
Q. And have been admitted to practice in the State of New York and in this Court for how long?
A. I think I have been admitted in 1881; I don't know when in this Court; perhaps twelve or fifteen years ago.
Q. And your office is at 309 Broadway?
A. Yes, sir.
Q. In the year 1905 you were the attorney for A. Fellerman & Son?
A. I don't recall the year.
Q. Were you their attorney in the bankruptcy proceedings instituted in this Court?
A. For a short period of time.
Q. Will you please tell the jury how you came to be the attorney of A. Fellerman & Son?
A. On a Friday—I don't recall—preceding the filing of the petition.
Q. The petition was filed Saturday, the 19th of August, 1905?
A. I think Friday was the first time I ever met with Mr. Woerbling, as I now recall, and he came to my office on that day, or telephoned or called at my office, and telephoned for Mr. Fellerman to come down to my office. I never heard or knew or seen anything of these people before. I never had any claim nor had anybody seen me about it. Mr. Woerbling said he couldn't take the case as he intended to marry the daughter of Mr. Fellerman.
Q. Was Mr. Woerbling at your office when he telephoned to Fellerman to call at your office?
A. I can't recall; I do know that I never heard of them or met them or didn't know of their existence till about that time.

Q. Did you at any time prior to that telephone to Fel-
118 lerman and tell them or either of them, that they were going to fail, and that they should come down to your office?
A. I did not; Mr. Woerbling might have telephoned.
Q. I mean you?
A. No, sir.
Q. Did you at any time thereafter, telephone to Mr. Fellerman & Son and say, "Now, I know you are going to fail, and as I am an attorney, you had better come down to see me, and I will take care of you"?
A. I made no claim on their attention at all.
Q. Did you do any such telephoning at the instigation of Mr. Levison or the National Discount Company?
A. I didn't know that there was such a concern in existence; the

first time I ever heard of the National Discount Company was about two years ago.

Q. Did you ever act as attorney for them?

A. Never in my life in any way.

Q. Did you ever talk with him or with any one of the National Discount Company about the case of Fellerman & Son?

A. Absolutely no.

Cross-examination by Mr. ELKUS:

Q. When did you first become acquainted with Mr. Levison?

A. The first time I ever met him was about a year ago.

Q. Was that in some bankruptcy or court proceeding?

A. No, I was introduced to him; I never had any dealings with him.

Q. You never saw him before that time?

A. I never saw him before I met him at that time; about a year ago.

Q. You are sure of that. Isn't it a fact that you examined him as a witness, or your office did, in some bankruptcy proceeding more than two years ago?

A. My office may have examined him repeatedly, Mr. Elkus, and our office may have had repeated communications in writing with him, but I didn't meet him pesonally, and I never had any transactions with Mr. Levison, personally.

119 Q. In 1905 you were without a partner, were you?

A. I had no partner in 1905.

Q. Your old firm had dissolved?

A. I had three gentlemen in the office taking charge of bankruptcy work with me, outside of the other clerks.

Q. And is it your recollection that your office, or some one of these three gentlemen, did examine Mr. Levison, or his concern, in some bankruptcy proceedings, a number of times in the last three or four years?

A. They may have.

Q. Your recollection is of your first hearing of this transaction when Fellerman came to the office with Woerbling?

A. He may not have come direct with Mr. Woerbling; he may have come down himself.

Q. You remember seeing him at your office?

A. I didn't know him till he was introduced.

Q. But when he sent in he said, "I am Fellerman"?

A. Yes.

Q. I suppose a man who comes to your office gives his name to some boy, and the boy brings it in to you, and then the man is ushered in if you are not busy?

A. I can't say whether that happened.

Q. That is the usual practice?

A. That is the usual practice.

Q. And of course if that happened, when the boy brought in the name of Fellerman you would know that it was Fellerman?

A. Yes, sir.

Q. You don't remember whether Fellerman came there alone or not the first time he came?

A. I do not.

Q. And you don't remember what took place when he did come?

A. I do remember what took place.

Q. What took place the first time he came?

A. When Mr. Fellerman called there were two or three other parties with him; he brought with him a statement.

Q. This was the first time he called?

A. Yes, sir.

Q. Who was with him?

A. I know who was in my office.

120 Q. Who came with him?

A. I don't know whether his son-in-law or his daughter or some friend; I can't say.

Q. I asked whether you remember who came with him, if anybody?

A. Some people called with him; the names to-day I cannot remember.

Q. Was Woerbling with him the first time?

A. I am not sure.

Q. Prior to his coming there had you seen Woerbling?

A. Mr. Woerbling had 'phoned me; if I remember correctly.

Q. Had he 'phoned you that his father-in-law—or at that time it was not his father-in-law—that he couldn't take the case; was that what he telephoned you?

A. I can't be sure about my recollection, except that I didn't know the man.

Q. Won't you answer my question; you have had a good deal more experience, and are an abler lawyer than I am. Will you say you had the telephone talk with Woerbling before Mr. Fellerman came there at all?

A. To the best of my recollection I will say yes, or a personal talk with him on Friday.

Q. On the same day?

A. Yes, sir.

Q. The substance of that talk was that his father-in-law was coming down to see you, or that his father-in-law was going to fail?

A. He didn't say he was going to fail; he was in difficulty and wanted to put through a settlement.

Q. Was anything else said by Woerbling?

A. That he would come up that day if he could, or the following morning; Mr. Woerbling.

Q. He was a law clerk, wasn't he?

A. I understand so.

Q. Didn't you know his office at that time?

A. I think he was in Mr. Carruth's office.

Q. Carruth & Carruth?

A. Yes, of 120 Broadway.

Q. They were lawyers?

A. Yes, sir.

Q. They had a large bankruptcy practice?
A. Not to my knowledge.
Q. Well, some?
A. Very little, to my knowledge.

121 Q. And you said in answer to Mr. Gainsburg that you didn't know whether or not Woerbling telephoned to Fellerman to come down to you; is it a fact or not that Woerbling telephoned from your office to Fellerman to come down?
A. I honestly cannot recall.
Q. You can't say?
A. I can't say.
Q. Do you know whether or not Woerbling telephoned, or that some clerk of yours telephoned to Mr. Fellerman that he wanted to see him?
A. I can't say that.
Q. That may have happened?
A. It may have.
Q. This petition was filed by Stern, Singer & Barr, wasn't it? You knew the petition was going to be filed?
A. I didn't know it till on Saturday; I telephoned them to file it.
Q. You arranged with them?
A. No.
Q. What did you telephone?
A. I received word from Fellerman's place that the American Woolen Company and other creditors were there, and that there was a general scramble, as I recall it; Fellerman had called at my office with a view of putting through a settlement, and when I received this information on the 'phone I telephoned Mr. Barr to file a petition——
Q. And they were afterwards attorneys for the receiver?
A. I don't know anything about that.
Q. Didn't you appear for Fellerman after that?
A. I did, for a short time.

Redirect examination by Mr. GAINSBURG:

Q. When did you leave the case?
A. I left the case after an examination that was taken before Commisisoner Alexander; taken under Section 21-A.
Q. You then got out?
A. I then got out.
Q. By reason of some things that happened there?
A. Yes.
Q. You thought that by having the petition filed the interests of the general creditors would be best served?
A. There would have been nothing left if it hadn't been done.

122 Q. This case, was it or not brought to you by Mr. Woerbling?
A. Positively and absolutely by Mr. Woerbling; I never had a claim or any knowledge of these people or saw or heard or dreamed of such a concern as A. Fellerman & Son.

Q. And it was not sent to you by any other person, firm or corporation?

A. No living soul in the world.

Recross-examination by Mr. ELKUS:

Q. As far as you know—do you know whether or not Mr. Levison didn't telephone to Mr. Fellerman that he should come down to your office?

A. It might have happened; I don't know anything about that.

Mr. GAINSBURG: There is no such evidence in the case.

Q. Mr. Fellerman paid you a fee that first day that he came there?

A. I don't think he did, as I remember.

Q. Didn't he pay you any fee?

A. Yes, sir.

Q. When did he pay it? The second day?

A. I may not be correct in my memory; I don't know.

Q. The first or the second day?

A. He came there late on a Friday to my office.

Q. And you asked for what you thought was a proper fee, and he paid it, didn't he? I mean a fee commensurate with your experience?

A. I don't know whether he paid me any money, or his son.

Q. Well, he was his partner?

A. Yes, sir.

Q. Didn't they give you a thousand dollars the first or second day they got there, in cash?

A. That is a pretty hard question to answer.

Q. Why? I thought a lawyer always remembered the money he got; maybe not if he got as much as you?

A. I don't know as I got a thousand dollars.

Q. How much did you get?

A. As far as I am willing to commit myself on my oath, I only recall $700; it may have been more.

Q. Didn't he pay you or hand you one thousand dollars in cash?

A. No, he did not.

123 Q. How much in cash did he hand you; either for yourself or somebody else?

A. I may be mistaken, but the best of my recollection and all I am willing to swear to is $700.

Q. Isn't it a fact, and see if I can't refresh your recollection, that he gave you a thousand dollars in money; whatever he gave you was in money?

A. Yes, sir.

Q. Not a check?

A. No check.

Q. Isn't it a fact that he gave you a thousand dollars, and of the thousand dollars that you kept your fee $750, and that the balance went towards paying the expenses of filing the petition?

Mr. GAINSBURG: How is this at all material?

Question withdrawn.

The WITNESS: I should like to say one thing, that I don't remember; I prefer to stand upon the examination which your office submitted me to two or three years ago; it may have been a thousand dollars; I keep ledgers and books, and I can tell you all about it.

MAX W. SOLOMON, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. GAINSBURG:

Q. You are in business in New York?
A. Yes, sir.
Q. And are of what firm?
A. J. Solomon & Sons.
Q. What is their business?
A. Wholesale clothing.
Q. Where is your place of business?
A. 691 Broadway.
Q. Do you know Mr. Levison, of the National Discount Company?
A. Yes, sir.
Q. And Mr. Fellerman?
A. Yes, sir.
Q. A. Fellerman & Son; do you know that firm?
A. Yes.
Q. Did you know them in August, 1905?
A. Yes, sir.
124 Q. Were you at that time a stockholder in the National Discount Company?
A. Yes, sir.
Q. Are you still?
—. Yes, sir.
Q. Do you remember some time in the month of August, 1905, Mr. Fellerman, of A. Fellerman & Son, calling upon you?
A. Yes.
Q. Can you state what he said to you; what the conversation was about?
A. Well, Mr. Fellerman called at my place of business, and asked me whether I couldn't lend him some money; so I told him I didn't have any money at that time I could give him, and he said he had got to have it; he had got to have $3,000 or $4,000; I don't remember the amount; for the reason of meeting a note that came day or the next day; and I suggested to him that I knew a concern that did that kind of business of lending money to merchants in good standing.
Q. Did you mention the concern's name to him, do you remember?
A. He wanted to know who it was, and I told him it was Mr. Levison, of the National Discount Company.
Q. And what did he say?
A. He said he would appreciate very much if I would go down with him.

Q. Did he say whether he had known, or even had seen that concern before?

A. On my way down town he said, "I was up here last week, or a few days ago."

Q. Did you go in with him?

A. Yes.

Q. Did you introduce him to Mr. Levison?

A. Yes.

Q. Tell us what occurred when you introduced him to Mr. Levison, as near as you can recollect?

A. I introduced Mr. Fellerman to Mr. Levison and told him Mr. Fellerman was an old friend of mine, and a good, reliable concern, and that he needed money, and that anything he would do for him would be appreciated by us both; they talked to one another I suppose, and I left.

Q. That was all the connection you had with him?

A. That was all the connection I had with it.

125 Q. Prior to the time of this first conversation that you said you had with Mr. Fellerman in August when he came to ask you for money, had you been in the habit of lending him money off and on?

A. Yes, for years.

Q. How long have — known him?

A. For thirty years.

Q. Was there anything said to you or in your presence to Mr. Levison by Mr. Fellerman about his financial condition at that time?

A. Well, Mr. Levison wanted to know what kind of a concern this Fellerman was, and I told him as far as I knew he was a good, reliable merchant, Mr. Fellerman; Mr. Levison looked up the rating in the mercantile agency book, and he had a rating of $50,000 to $75,000, credit high.

Q. That was all that was said or done in your presence about his financial standing?

A. Yes, sir, so far as I know.

Cross-examined by Mr. ELKUS:

Q. What did you say your business was?

A. Clothing; manufacturer of clothing.

Q. You knew Mr. Fellerman for how many years?

A. A good many years.

Q. You had loaned him money?

A. Yes.

Q. Any large amount?

A. No, not a large amount; sometimes a thousand dollars, and sometimes $500 or $300.

Q. Did he pay it back promptly?

A. He paid it back promptly.

Q. So that his credit with you stood very high?

A. Yes, it did.

Q. You had heard nothing of any intended failure or trouble?

A. No.

Q. You knew that he had accounts in one or two banks?
A. I didn't know that.
Q. Didn't you know that he had an account in the Union Exchange Bank and in the Oriental?
A. No.
Q. Didn't he tell you?
A. No, sir.

Q. Didn't you, as a business man, tell him or say to him,
126 "Why don't you go to the bank and borrow money?"
A. Maybe I did.

Q. What did he say to you, if you told him that?
A. He said he had a note to meet the next day, and wanted to make that note good before he could ask for another loan.
Q. Did you tell him to go to his other bank?
A. I didn't know anything about any other bank.
Q. You discussed with him the matter of getting the money from a bank?
A. Well, in the usual course of conversation I might have said that; I can't remember what I might have said; what I naturally would say, I said.
Q. I am not asking you that; do you remember what you did say?
A. About what.
Q. About his going to the bank and getting a note discounted?
A. He didn't ask me anything about that.
Q. Didn't you tell me just now, in the presence of this jury, within one minute——
A. He probably couldn't——
Q. I didn't ask that.
A. I don't know anything about his business.
Q. Didn't you tell me within the last minute and a half that Mr. Fellerman and you had discussed his getting a note discounted in the bank?
A. I didn't say that.
Q. Didn't you say that?
A. No.
Q. What did you say about discounting the note in the bank?
A. He said he had to meet a note in the bank that day, or the next.
Q. But what did you say to him about getting another note discounted?
A. How could a fellow get——
Q. Don't ask me questions; you just answer mine.
A. I didn't say anything to him about banks.
Q. Did he say anything to you about banks?
A. He may have.

Q. Didn't you say just now that one of the reasons he gave
127 that he didn't want to go to his bank was because the note was coming due and he wanted to take it up?
A. I only presumed that.
Q. Don't testify your presumption.
A. I know my nature in having conversations.

Q. Do you say that you are testifying to what you presume took place?
A. No, that I know as positive; but there is a lot of little things that I presume.
Q. Have you told the jury anything that you presume took place?
A. Such as what?
Q. Anything that you have said this morning?
A. Well, I presume that I took the car down to court——
Q. Have you told them that?
A. What do you mean you want to know?
Q. I want to know from you if you are testifying to facts, or what you assume to be facts?
A. Well, I will tell you anything I know to be facts, and what I assume to be facts.
Q. Won't you be kind enough——
A. Sure.
Q. Won't you wait till I get through? Are you a director of this company?
A. No, sir.
Q. Were you ever a director?
A. No.
Q. Are you a stockholder?
A. Yes, sir.
Q. How much stock do you own in this company?
A. Well, I own one share and my father owns one share.
Q. What is your father's name?
A. Joseph Solomon.
Q. Are you a relative of Mr. Levison's?
A. No, sir.
Q. How do you come to own one share?

Objected to as immaterial. Objection overruled. Exception.

Q. When did you get that share?
A. When the company was organized.
Q. Was it preferred or common stock?
A. It was preferred.
Q. How much did you pay for it?
A. Five hundred dollars.
128 Q. You paid five hundred dollars?
A. Yes, sir.
Q. Did anybody give it back to you?
A. No.
Q. You have still one share of preferred stock for which you paid $500?
A. Yes, sir.
Q. What is the par value of that share?
A $500
Q. You are sure of that?
A. Well, it may be five shares or one share.
Q. Have you ever seen the stock?
A. I have got it in my safe.

Q. Have you ever had a dividend?
A. A dividend every six months, six per cent.
Q. And you don't know whether it is one share or five shares?
A. I don't know; it is $500 worth; one certificate; I presume it is five shares; I think it is.
Q. Is that a presumption or a fact?
A. Well, I wouldn't swear to it; I know I got one certificate for $500.
Q. You are sure it is not a bond?
A. I am sure of that.
Q. Do you — what kind of a corporation it is; whether it is a New York corporation or a Massachusetts corporation?
A. No, I don't know anything about it.

Mr. GAINSBURG: It is a Maine corporation.

Q. You don't know whether it is a Maine, or a New York, or a Georgia corporation?
A. I don't know.
Q. You knew that firm of Fellerman's rating was $75,000 and credit high in the mercantile agencies?
A. It was a good rating, anyway.
Q. Didn't you say in answer to Mr. Gainsburg, that Mr. Levison looked it up in your presence and the rating was $75,000 and credit high; and was that a presumption or a fact?
A. $50,000 to $75,000.
Q. (Repeated.) Didn't you say in answer to Mr. Gainsburg, that Mr. Levison looked it up in your presence and the rating was $75,000 and credit high; was that a presumption or a fact?
A. I said that, yes.
129 Q. Was it presumed, or was it true?
A. Well, it was presumed.
Q. Then that is one of the things that happened at that interview that didn't take place, but you presumed it?
A. I know that Mr. Levison——
Q. Answer my question, yes or no?

Objected to.

A. I know that Mr. Levison picked up the mercantile agency book and looked at the rating, and I presume that it was $50,000 to 75,000, credit high, I don't remember which.
Q. Where did you presume that from?
A. Because I was there.
Q. Did you see it?
A. Yes, sir.
Q. You looked over his shoulder?
A. I looked at the book.
Q. And you knew that his rating was $75,000, credit high?
A. High, or good.
Q. And that meant, as you understood then, that he had $75,000 of assets over his liabilities?
A. Yes.

Q. Did you hear anything about the charge that was going to be made by Mr. Levison for this business?
A. I knew there was going to be some charge.
Q. I didn't ask that; did you hear about it?
A. There was talk about it, yes.
Q. You are not presuming this?
A. I heard a conversation; this is a matter that took place three years ago, and the first thing I knew about it was this morning.
Q. When did it take place; what year?
A. In 1905, I think.
Q. What month?
A. In August.
Q. And the first thing you knew about it was this morning?
A. About what was going on, yes.
Q. You hadn't heard a word about this thing till this morning?
A. I heard about the case several months ago.
Q. What did you mean when you said a moment ago that
130 the first thing you heard about it was this morning?
A. About my testifying here.
Q. Then the first thing you knew that you were going to be asked to tell what took place was this morning?
A. In this case, yes.
Q. About what happened. Had you never been asked by anybody before this morning as to what took place?
A. Yes.
Q. Who asked you?
A. Mr. Gainsburg.
Q. Then you did hear about it; did you tell him what took place?
A. Yes.
Q. When was that?
A. Oh, I don't know; about six months ago; maybe less than that.
Q. Then you weren't quite correct when you said that the first you heard of the matter was this morning?
A. No.
Q. And six months ago, when you and Mr. Gainsburg, Mr. Levison's attorney, talked this over you told him everything that happened, didn't you?
A. Yes.
Q. You told him just as you have told it here?
A. Yes.
Q. And did he say that he wanted you to bring out certain points very clearly?
A. I don't understand what you are trying to get at.
Q. Is the wording—you were born in this country, weren't you?
A. Yes, sir.
Q. And have been here all your life.
A. Yes, sir.
Q. And you don't understand that question? All right. Now, when you went down with him did you talk with Mr. Fellerman on the way down from your place of business to Mr. Levison's?
A. I don't think so.

Q. You were going down with him as a favor to him?
A. To Fellerman.
Q. He said, "I will appreciate it if you will come down with me?"
A. Yes.
Q. He used those words to you?
A. He may not have used those words, but to that effect.
Q. Did you tell him you were a stockholder of the company?
A. Yes, sir.
131 Q. Then he went down with you?
A. Yes.
Q. And on the way down did you ask him how business was?
A. I don't remember.
Q. Didn't you say, "How is business"? and didn't he say, "I am very short of money"?
A. He probably said that.
Q. And didn't he say, "My creditors are pressing me, and I need money very badly"?
A. I don't think he told me that.
Q. You won't say he didn't will you?
A. No, I wouldn't say so.
Q. And didn't he say to you after that in the course of this conversation—you and he being intimate friends—didn't he say, "If I can't get money, no matter at what cost, I will have to fail," or something to that effect?
A. No, sir.
Q. You are sure of that?
A. Positive.
Q. Well, did he put it a little differently; did he say, "Unless I can get money to meet my pressing obligations I will have some trouble," or, "there will be trouble"?
A. No, he didn't tell me anything of that sort.
Q. Did he tell you what creditors were pressing him for money?
A. No, sir; he didn't say anything about creditors pressing for money.
Q. Didn't you tell me he was very short of money and was being pressed for money?
A. I don't think I said that.
Q. Didn't he say that to you?
A. No, sir; all I know is that he had to meet a note.
Q. Didn't he say that?
A. He didn't say anything about creditors; creditors are supposed to be A-1 with me.
Q. Didn't he say he was being pressed for money by somebody?
A. No, sir.
Q. Didn't he say he was being pressed for money at all?
A. No, sir.
Q. Didn't you just say in the presence of the jury that on the way down to the National Discount Company he did say to you that he was being pressed for money?
A. I didn't say that.

132 Q. You didn't say that?
A. No.
Q. On the way down did you tell him that Mr. Levison loaned money on accounts?
A. On the way down; I told him that in my office.
Q. Did you tell him how much he charged?
A. No, sir.
Q. Did you tell him he charged six per cent. interest?
A. No, sir.
Q. You know that if he got a note discounted in the bank he would have to pay, and would pay, interest?
A. Yes.
Q. And that interest, according to a man's credit, was sometimes six per cent. and sometimes even less per annum?
A. Yes, sir.
Q. Without security?
A. Yes.
Q. And when he went down there, or on the way down, or before you got down, did you tell him that Mr. Lewison was going to charge him five per cent.?
A. No, sir.
Q. Did you know that he was going to charge him five per cent.?
A. No, sir.
Q. Did you know that whatever percentage he charged him he charged on the face amount of the accounts assigned without regard to the money advanced?
A. No sir.
Q. You had never done any business with that company?
A. No.
Q. You got all the money from your bank at six per cent. or less?
A. Or less.
Q. Less, I presume, mostly. As a business man you knew that any man in good standing with a rating and credit in Bradstreet or Dun's of $75,000 of assets over liabilities, and credit good or high, could borrow all the money he was entitled to from his banks?
A. That I don't know.
Q. Don't you know that, as a business man?
A. No, sir.
Q. Do you mean to say that you have no opinion on that subject?
A. I haven't; what are you talking about? The general public?
Q. Don't you know what I am talking about?
A. Are you talking of Fellerman's case?

133 Redirect examination by Mr. GAINSBURG:

Q. All that Mr. Fellerman told you——

Objected to as leading. Objection overruled. Exception.

Q. Did I understand you to say that all Mr. Fellerman told you on your way to the office of the National Discount Company was that he had to meet a note in the bank; that either was due this day or the day after?

Objected to as leading. Objection overruled. Exception.

A. That was the only conversation I had with him at my office.

Q. And you knew nothing at all about the charges, or the commissions or any arrangements made?

A. Absolutely nothing.

Recross-examination by Mr. ELKUS:

Q. You say when you got down to this place of business of the National Discount Company, Mr. Fellerman said, "I know this place, I have been here before"?

A. Yes.

Q. And he had met Mr. Levison before?

A. So I understood.

Q. But still you introduced him to Mr. Levison?

A. Yes.

Q. Although he knew him; did Mr. Levison apparently know him?

A. I don't remember.

JULIUS LEWIS, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. GAINSBURG:

Q. You are connected with the National Discount Company?

A. I am.

Q. In what capacity?

A. Secretary.

134 Q. Were you connected with that company in August, 1905?

A. I was.

Q. In what capacity were you then connected with the concern?

A. A sort of assistant to the books; general office man.

Q. Who was the secretary of the concern at that time?

A. Mr. Debolt.

Q. Did you on or about the 15th of August, 1905, call at the office of A. Fellerman & Son?

A. I did.

Q. At whose suggestion?

A. Mr. Levison's, and likewise Mr. Debolt's.

Q. You didn't see Mr. Fellerman?

A. I did not.

Q. You had no talk with him at all?

A. None whatever.

Q. Did you receive any statements of accounts, or did you have any such statement with you when you called at their place of business?

A. I think I did.

Q. Who handed it to you?

A. I know either Mr. Debolt or Mr. Levison.

Q. When you came to Mr. Fellerman's place of business——

A. I think it was a young lady bookkeeper.

Q. Did you recognize the young lady who was the witness yesterday?

A. I think that was the young lady, if I am not mistaken.

Q. Did you speak with her?

A. I did.

Q. Did you speak with her with reference to the accounts or statements that you had in your possession?

A. About the accounts only.

Q. Now tell us what you said?

A. I stated that I was up there on an errand to arrange about the accounts that Mr. Fellerman had brought down to the National Discount Company and at his suggestion I brought them up to show her how to arrange her books; and I looked—I handed her the statements, and I called off the names and I stamped three or four of the accounts on the books, and told her that she could arrange any of the accounts that were transferred to us, that she should stamp them, that this account was transferred to the National Discount Company.

135 Q. Did you have a stamp with you?

A. Yes sir, I think so.

Q. And you stamped a few and told her to stamp the balance?

A. I either stamped or wrote in a few words that the account was payable to the National Discount Company.

Q. And the balance that you did not stamp, did you read that off to her, and did she stamp them in the book?

A. I think I did.

Q Did you look through any other books?

A. I did not.

Q. Did you take from the books—that is, go over the books and write from the books into statements that you had with you, or that were furnished at Fellerman's place of business on that day—accounts of upwards of $8,000?

A. I don't think I did.

Q. Did you or did you not?

A. I did not.

Q. Did you write out any accounts, taking them from the books?

A. I did not.

Q. Did you call there a second time after that?

A. I did not.

Q. Did you at any time after that call again and write from these books the names of debtors upon various statements furnished to you?

A. I did not?

Q. Did you ask to look at any other books other than the books wherein the accounts were contained?

A. I did not.

Q. Did you go through the books other than examining the three or four accounts which you say you stamped?

A. I did not.

Q. And how much worth of accounts did you then take with you?

A. I think it was $4,500 or $5,000 worth, or thereabouts.

Q. Did you know at that time in any way that these were all or nearly all of the accounts of that concern?

A. I did not; I knew nothing about that.

Q. Did you go through the books, and did you thereby ascertain whether or not those were all or nearly all of the accounts?

A. I did not.

Q. What were the instructions which you received and
136 under which you called at Mr. Fellerman's place of business?

A. I was just to arrange those particular accounts that were handed to me; I was to enter it on the ledger that they were transferred to the National Discount Company.

Q. That it should turn them over to the National Discount Company?

A. Yes, sir, that it was transferred to the National Discount Company.

Cross-examined by Mr. ELKUS:

Q. What did you say your business was with the company?

A. Secretary to the company.

Q. Are you a stockholder?

A. I am.

Q. How many shares of stock do you hold?

A. Six shares..

Q. Paid for them?

A. Paid for them.

Q. $500 a share?

A. $100 a share.

Q. Preferred or common?

A. Common stock.

Q. Does the common stock pay any dividend?

A. Not as yet.

Q. How long have you been a stockholder?

A. About three years.

Q. And you paid $600 par for six shares of common stock of this company and never got a dividend?

A. I have not received any dividend as yet.

Q. Has there ever any been declared?

A. Not as yet, on the common stock.

Q. How long have you been secretary?

A. About four years.

Q. How much is the common stock of the company?

A. $75,000 in amount.

Q. Isn't it $500,000?

A. Not that has been issued.

Q. Do you know how much the preferred stock is?

A. Issued $75,000.

Q. Is Mr. Levison the principal stockholder?

A. Yes, sir.

Q. How much stock does he own?

A. I can't tell exactly.

Objected to as immaterial.

The COURT: I think it is immaterial how much he owns.

137 Q. The authorized preferred stock to be issued is $500,000, isn't it?

A. That is right.

Q. And all the preferred stock is entitled to a dividend of five per cent.?

A. At six per cent. per annum.

Q. Six per cent. before any dividend can be declared on the common stock?

A. I believe that is right.

Q. And the common stock that is to be issued is also $500,000?

A. That is right.

Q. Did you get any of your money back that you paid for your common stock?

Objected to as immaterial and irrelevant.

Objection overruled.

A. Not as yet.

Q. Have you got any agreement to get it back?

Same objection, ruling and exception.

A. I have not.

Q. Are you a secretary under a salary?

A. Yes, sir.

Q. Are you bookkeeper also?

A. A sort of assistant.

Q. Who is the bookkeeper?

A. Mr. Thomas Forbes.

Q. And you are his assistant?

A. Somewhat, yes.

Q. Who are the other directors of the company?

A. Mr. B. Levison, Jr., Mr. Jacob B. Munter, S. M. Cantrovitz and Mr. Henry Sanders and myself.

Q. Are any of the others there in the business?

A. They are not.

Q. None of them?

A. None of them.

Q. Do you know them all?

A. Every one of them.

Q. You say there are $75,000 of preferred stock issued and $75,000 worth of common?

A. That is right.

Q. So there is still to be disposed of by the company $425,000 of preferred stock and $425,000 worth of the common stock?

Objected to as argumentative and immaterial and irrelevant.

138 The COURT: It is introductory to what he is going to say.

A. That is right.

Q. Were you selling stock—your company?

A. I don't know, since I have been secretary.

Q. Well, you were employed before you were secretary?
A. Yes.
Q. Did they sell stock before?
A. I don't think so.
Q. Was it offered for sale?
A. I don't think so.
Q. You got your stock since you were secretary?
A. I purchased that from one of the stockholders.
Q. Which stockholder?
A. I really don't remember; I should have to refer to the records for that.
Q. Is this treasury stock or is this capital stock that is authorized to be issued, but no- issued; does it belong to an individual?
A. It has not been issued.
Q. It has never been issued?
A. It has never been issued at all.
Q. You went up on what day to the Fellermans place of business?
A. I think the day he came down with the statement; on the day he signed the contract; I think it was the 15th of August.
Q. You are sure of that?
A. I am positive.
Q. Was that the first and only time you were there?
A. The first and only time.
Q. You went up there for the purpose of showing the Fellerman's how to stamp on their books that the accounts had been assigned to you?
A. That was all.
Q. And you had absolutely nothing else to do there?
A. Absolutely nothing else whatever.
Q. You were the secretary of the company?
A. Not at that time.
Q. What were you then?
A. I was clerk and assistant bookkeeper at that time.
Q. How much salary did you get there?
A. Eighteen or twenty dollars a week.
Q. How much do you get now?
A. About fifty.
Q. Well, is it fifty?
A. Forty-five dollars a week.

Q. Did you have a particular stamp that had been pre-
139 pared by you by a lawyer to put on these books?

A. No, I can't say that; I don't remember whether I wrote that in the book or whether it was just a simple stamp "Transferred to the National Discount Company."
Q. What did you write in the book?
A. Transferred to the National Discount Company.
Q. Is that the stamp, "For value received do hereby sell, assign, transfer and set over to the National Discount Company," and about two paragraphs of fine type (referring to paper)?
A. No, not what was in the book.

Q. (Reading from paper.) "Transferred to the National Discount Company;" what did you do that for?

A. To show that the account was transferred to the National Discount Company.

Q. Why did you have to put it in the book?

A. It is customary.

Q. Do you mean to say that it is customary whenever an account is sold, to go to a man's place of business and write in his ledger, "Transferred" to such and such a bank or concern?

A. We don't buy accounts.

Q. I am asking, do you mean to say that that is customary?

Objected to as to form. Objection overruled. Exception.

A. Those are the instructions.

Q. Who gave you the instructions?

A. Mr. Levison and Mr. Debolt.

Q. Then these were not the customary instructions, were they?

A. They were.

Q. Do you mean to stand on your answer that this was the customary thing to do when you bought an account, or loaned money on accounts, to go to a man's place of business and write on his books, "Transferred to the National Discount Company"?

A. It was.

Q. You did that in every case?

A. In every instance.

140 Q. You never missed it?

A. Not as far as I know.

Q. No matter how great or how small the transaction was?

A. It made no difference.

Q. Did you always do it?

A. Not always.

Q. Who else did it?

A. That I don't know, who did it before I did; I have done it in several instances.

Q. That *step* which I referred to in my question was put on the back of every statement that Fellerman brought to you, wasn't it?

A. Which stamp?

Q. The stamp, "For value received do hereby sell, assign, transfer," etc.?

A. Not on every one; only on the duplicates that were kept as our record.

Q. The duplicate was the duplicate of every account transferred, wasn't it?

A. That is right.

Q. So that with every account did you put on that this stamp assigned, that the accounts were assigned, etc., on the back of the account assigned by A. Fellerman & Son?

A. That is right.

Q. In the books up there you didn't have Fellerman sign anything at all, did you?

A. Not at all.

Q. You just wrote, "Transferred to the National Discount Company"; the idea was to give notice to anybody who would look at those books that they had been transferred?

A. That is right.

Q. So the man shouldn't sell the accounts over again?

A. That I couldn't say; it was to show to anybody that might look at those books that the accounts belonged to the National Discount Company.

Q. Of course Fellerman knew that he had sold them?

A. I should imagine so.

Q. That it was to be shown to somebody else that might come in there and look at those books?

A. Yes.

Q. A trustee or receiver in bankruptcy, for instance?

A. I don't know as I had that in mind.

Q. That was one of the things that you always protected yourselves against?

A. I should imagine so.

Q. Don't you have a trustee in mind whenever you go up
141 and have these accounts assigned and enter this on the books?

A. Generally, yes.

Q. So, that when you went up to Fellerman & Son's and wrote that on the books and told Bella Fellerman to write it on the other accounts you had it in your mind that a receiver in bankruptcy might look at that and you would be sure that the Discount Company was safe because that was written there?

A. I can't say that, because I was a messenger at that time, and was doing my duty.

Q. It has been your experience; isn't that the fact?

A. I can't say that.

Q. Will you say it isn't so?

A. No, I won't say that; it is customary, I should imagine, and I had to do it.

Q. Where is it customary besides with you; where did you learn the custom?

A. From general conversation that it was customary.

Q. Where?

A. In our own office.

Q. I mean it was your office's custom?

A. In our office.

Q. Did you ever know of anybody else doing it?

A. I can't say.

Q. How long have you been in this kind of business?

A. Only since I am with the National Discount Company.

Q. How long is that?

A. I am with them now about five years.

Q. When you say it is customary, you mean it is the custom of your concern?

A. Yes, it is one of the clauses of our contract.

Q. Did you put that stamp on this paper?

A. I don't know whether I did or some one in the office may have.

Q. It was done with your knowledge, approval and superintendence?
A. I expect so.
Q. You saw that it was done?
A. Yes.
Q. You knew, as a matter of fact, that that was all you needed to bind Fellerman & Son to show that you owned the account?

Objected to as calling for a conclusion. Objection overruled. Exception.

142 A. Yes.
Q. Did you ever go up to see whether the Fellermans had written on all the accounts in the book "This account transferred to the National Discount Company"?
A. I did not.
Q. You just wrote two or three?
A. I depended upon her.
Q. You looked through the book while you were there?
A. I can't say that I did.
Q. Can you say you didn't?
A. Well, it is so long that I can't fully remember.
Q. Can you say that you did, or you did not?
A. I don't think I looked all through it, no.
Q. What part did you look at?
A. She called off several names to me of accounts that she had.
Q. And you looked at that account.
A. I looked at that account.
Q. Did you make any statement?
A. I don't think I did.
Q. (Handing witness paper.) Is this your handwriting?
A. It is not.
Q. You are not sure whether you did or did not make out any statement?
A. I am pretty sure that I did not.
Q. Then did you ask whether the goods had been shipped?
A. I think we had the receipts, if I am not mistaken, for they contemplated sending the receipts down showing the shipment of that merchandise.
Q. You didn't interest yourself in that?
A. Not at all.
Q. The Fellermans were in Seventeenth Street, weren't they?
A. I think so.
Q. And where was your place of business?
A. I think corner of White Street and Broadway.
Q. Did you go up with the elder or the younger Mr. Fellerman?
A. I went up alone.
Q. What time of day was it?
A. I think it was around noon time, or thereabouts.
Q. How long before that was Mr. Fellerman at your office?
A. I cannot say.
143 Q. Were you there when he was there?
A. I was not; not in his presence.

Q. You were in the office?
A. In the general office.
Q. How long after he left there did you go to Seventeenth Street?
A. I can't remember.
Q. Did he bring down these accounts that morning?
A. I believe he did.
Q. Already made out?
A. Already made out.
Q. And left them there with Mr. Levison?
A. I believe so.
Q. And then you got them and went right up there?
A. Yes.
Q. And you went back there at what time?
A. I can't remember; I don't think I stayed there more than twenty minutes to half an hour, at the outside.
Q. When you got up there, did you see anybody but the young lady?
A. I saw several people around there.
Q. Did you talk to anybody but her?
A. No.
Q. Did you see the elder Mr. Fellerman?
A. I did not.
Q. Did you see the younger Mr. Fellerman?
A. I can't say.
Q. You didn't speak to him?
A. I didn't speak to him.
Q. Whom did you ask for?
A. The bookkeeper.
Q. When you got the bookkeeper, what did you say?
A. I told her my errand; that Mr. Fellerman had been down to the National Discount Company and made arrangements there for a loan, and, as customary with our institution, and at the suggestion of, I understood, of Mr. Fellerman with Mr. Levison, I had come up to show her how we wanted the accounts kept on the books, so that it appeared that the account belonged to the National Discount Company.
Q. And that was all?
A. That was all.
Q. That was all you said?
A. That was all I said.
144 Q. And she didn't know you?
A. She didn't know me.
Q. You were a perfect stranger to her?
A. I was a perfect stranger to her.
Q. And she calmly turned the ledger over to you and allowed you to write on the ledger?
A. She did.
Q. At that time no assignment had been made to the National Discount Company?
A. I had those accounts in my possession.
Q. Were they assigned?
A. They were.

Q. Had the money been advanced?
A. That I don't know.
Q. You drew the check, didn't you?
A. No, I did not.
Q. What is your recollection; was the money advanced before you went up there, or after you got back?
A. I think that he received the check before I went up there.
Q. You think so?
A. I think so.
Q. Then you left?
A. Then I left.
Q. That is all you know about the whole transaction?
A. That is all I know about the whole transaction.
Q. Did you see the other books there?
A. No, I did not.
Q. Did you ask for any particular book?
A. I did not—the ledger.
Q. Which ledger did you ask for.
A. That the accounts were kept in.
Q. Did you look at any other ledger?
A. I did not.
Q. You had some talk with somebody in the office of your company before you saw them?
A. I can't say that I did.
Q. Didn't somebody give you instructions to go up there?
A. Just told me to take the statements and go up and have it stamped upon Fellerman's books that the account was payable to the National Discount Company.
145 Q. Had you a rubber stamp that you used for that purpose?
A. We had.
Q. Where is it?
A. Up at the office; we have several of them.
Q. I mean that you put on a man's books?
A. Yes, sir, "Payable to the National Discount Company."
Q. Isn't that a stamp that you put on a bill when you sent out a bill?
A. No, that is a different stamp.
Q. You wrote, "Payable to the National Discount Company"?
A. I am not sure whether I wrote it or whether we had the stamp at that time in use.
Q. Was it Mr. Levison who told you to go up there?
A. I don't know whether it was he or Mr. Debolt.
Q. You don't know what he said?
A. I don't — what he said other than, "Take these accounts and go up."

Redirect examination by Mr. GAINSBURG:

Q. After August 19th, 1905, did you prepare the statement of the accounts of A. Fellerman & Son?
A. Our bookkeeper did.
Q. Who was the bookkeeper?

A. At the time I think it was Mr. Forbes; I am not sure.
Q. Were these statements handed to you after they were prepared?
A. In several instances, yes.
Q. Did you mail any of them to James, Schell & Elkus, or Stern, Singer & Barr?
A. To James, Schell & Elkus.
Q. Can you state how many times between August, 1905, and the date of this suit, May, 1907, you mailed statements to them?
A. I can't say just how many—I know they were numerous; we have copies of them; they speak for themselves.
Q. Did you mail them yourself?
A. No, I think our office man did.
Q. Did you see them placed in an envelope?
A. Yes.
146 Q. And these statements were sent from time to time?
A. From time to time.
Q. Did you also write letters to James, Schell & Elkus about the amount of money that was on hand, and the amounts remaining uncollected?

Objected to. Objection overruled. Exception.

A. We did.
Q. Were you in the office at any time when Mr. Levis or Mr. Rosenberg, the counsel here, called and examined the books of A. Fellerman & Son?

Objected to as irrelevant and immaterial.
The COURT: I don't see how it is immaterial.
Mr. ELKUS: I will concede that you showed us your statements of the account as you made it out, and that we looked at the accounts in your books.
Mr. GAINSBURG: That Mr. Levis and Mr. Rosenberg——
Mr. ELKUS: Mr. Levis says he did.
The COURT: It is of no consequence; it is conceded.

BENNO LEVISON, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. GAINSBURG:

Q. Your full name?
A. Benno Levison, Junior.
Q. And you are president of the National Discount Company?
A. I am.
Q. The defendant here?
A. Yes.
Q. You of course know what this case is about?
A. I do.
Q. What is the capital stock of the corporation?
A. One million dollars.
Q. How much of that stock is common and how much is preferred?

A. $500,000 is preferred stock and $500,000 is common.

Q. Also tell Mr. Elkus the directors in the corporation.

147 A. The directors in the corporation are Mr. Sanders, myself, Mr. Lewis, Mr. Jacob B. Munter and Mr. S. M. Cantrovitz.

Q. Mr. Munter and Mr. Cantrovitz are related to you, aren't they?

A. Yes, sir.

Q. Mr. Sanders, is he related to you?

A. No, sir.

Q. Is Mr. Solomon related to you?

A. No, sir.

Q. And Mr. Lewis is not related to you?

A. No, sir.

Q. Has there been any change in the directorship of the company since it was started?

A. Yes, sir; there have been some changes.

Q. Was your brother a director of the company?

A. Yes; he sold me his stock.

Q. Any other officers?

A. Yes; Mr. Day and Mr. Dickson have withdrawn some weeks ago.

Q. Is Mr. Day still a stockholder?

A. No; I bought his stock.

Q. And Mr. Dickson?

A. No; I bought his stock.

Q. How much of the $500,000 of common stock has been issued?

A. $75,000.

Q. Has all that been fully paid?

A. Yes, sir.

Q. How much of the preferred stock has been issued?

A. $75,000.

Q. Has all that been paid for?

A. That has all been paid for.

Q. Has other than that stock ever been issued?

A. Never been issued?

Q. It is still treasury stock?

A. It is still treasury stock.

Q. It hasn't been issued?

A. It hasn't been issued.

Q. Coming down to this transaction, how long before August, 1905, had you been in business?

A. A. We started January 1st, 1904.

Q. And you incorporated under the laws of the State of Maine?

A. Of the State of Maine.

Q. And by that incorporation you were authorized to conduct a banking business, and discount accounts, and so on?

A. Yes.

148 Q. Where was your place of business in August, 1905?

A. Corner of White and Broadway.

Q. When was the first time you ever met Mr. Fellerman?

A. I met Mr. Fellerman about the 10th or 11th day of August,

either on a Thursday or Friday, but I am satisfied it was one of those two days.

Q. At that time was Mr. Debolt connected with your firm?

A. He was.

Q. In what capacity?

A. He was our secretary.

Q. Was Mr. Lewis connected with your firm?

A. Yes, sir; he was the assistant bookkeeper.

Q. On the 10th or 11th of August, when you say you first met Mr. Fellerman, will you tell us where you met him?

A. At our office.

Q. Did Mr. Fellerman call there alone?

A. He did; he called alone.

Q. Did he introduce himself to you?

A. He did; he sent his card in to me and I admitted him.

Q. Did you have a conversation with him?

A. I did.

Q. State what the conversation was.

A. Mr. Fellerman called on me on that morning and stated to me that he had heard of us; that he was in business, telling me that he was worth from $60,000 to $75,000; and what he was looking for was for some banker or financial man or house who would take charge of his office, because he claimed that the business was getting larger every year and that he had to buy a good many merchandise in the months of May, June and July that had to be made up; that he had to ship them in the months of July, August, September and October, and although he sold them for thirty to sixty days' time they took from three to four months to pay up; and he was busy with the manufacturing and designing, and that he would very much like to make an arrangement with us whereby we could attend to the financing of his business and attend to the collection of his bills looking up the credits of the people who bought from him and looking up references, and assisting him
149 in every way, manner and form. I told him we could do so. He then said to me, "Is there anything for me to do?" I said, "Yes, sir; we will call to look into your business at once, or find out who you are; you are an entire stranger to me; you can take our contract and look it over." I opened a drawer and took out one of our regular contracts and said, "You take this contract home with you and read it over"; and he said, "What is it going to cost me?" and I said "We will take over your entire office arrangements; we will look after your credits of the customers who purchase from you; we will attend to anything that might get lost in the shipping department and make your collections and whatever is necessary, advise with you, and for that we will charge you five per cent. commission on the gross amount; we will also charge you on whatever money you borrow from us six per cent. per annum, and we will allow you on all collections that come in at the rate of six per cent. per annum."

Q. What did he say to that?

A. He said, "I am going home to consult my son, and I will be in to see you again."

Q. Did he take with him the printed contract which you say you handed to him?

A. He did; he put it right in his pocket, and he walked out.

Q. After he went away what efforts, if any, did you make to ascertain the financial standing of Fellerman?

A. I went into the office and looked up his rating in Dun's and Bradstreet's and found his rating in Dun's, to be perfectly sure—I think I have it written on the contract—I think it was "$50,000 to $75,000 good," and in Bradstreet's, "$50,000 to $75,000 fair."

BENNO LEVISON, Jr., resumes the stand.

Direct examination continued by Mr. GAINSBURG:

Q. Did you have any conversation with Mr. Fellerman on that day concerning his solvency or insolvency?

A. On what day?

150 Mr. ELKUS: I object. There is no objection to his stating the entire conversation.

Objection overruled. Exception.

Q. On the first day that he called?

A. Well, not immediately, because he came simply to make an inquiry.

Q. Just answer the question; did you, yes or no?

A. I don't remember that.

Q. Did he come back to your place of business after the first interview?

A. Yes.

Q. When?

A. On Monday morning, the 14th of August.

Q. Was he alone, or was there any one with him?

A. No, he came with Mr. Solomon.

Q. The gentleman who was on the stand this morning?

A. Yes.

Q. Did Mr. Solomon speak to you?

A. Yes.

Q. About Mr. Fellerman?

A. Yes.

Q. What did he say?

A. He introduced him to me and stated that he had known him for a number of years as a very responsible man, and anything that I could possibly do for him would be very much appreciated.

Q. Did you say to Mr. Solomon that you had already met Mr. Fellerman?

A. Yes, I said to Mr. Solomon that I had met Mr. Fellerman and that I had gone into the merits of the case; that was about all.

Q. Did Mr. Solomon stay there after he introduced him, or did he go away?

A. Oh, he stayed there only about ten minutes; that was all.

Q. Did Mr. Fellerman go with him?

A. No, he remained there.

Q. State the conversation you had with Mr. Fellerman at that time?

A. Mr. Fellerman stated to me that he had spoken with his son and that he thought that I should make the rate somewhat less than five per cent., inasmuch as the business would be very large; I explained to him the difficulty that I thought would be in the
151 ready-to-wear garments for women; as the sale of them depended largely upon the fit and style of the garment and there would be a lot of returns and a lot of correspondence associated with it; however, I told him that if he did $100,000 worth of business with us, or more, that I would give him a rebate of two per cent., so that the charge for the collection of the accounts and attending to his business and everything of that nature would be three per cent.

Q. That was in the event that he did a business of $100,000 a year?

A. Yes, sir.

Q. Did you take out a new contract or did he hand you the contract that he had?

A. No, I did not take out a new one, and neither did he hand me the contract that he had; he said he would go back to his place of business, and might, perhaps, come back the next day.

Q. Was that all the conversation that you had with him that day?

A. As far as I can recall.

Q. Was there at any time then anything said to you by Mr. Fellerman that creditors were pressing him.

A. No, sir.

Q. Or that he was insolvent?

A. No, sir.

Q. Or that he needed money?

A. No, sir.

Q. Did he come back to you on the following day?

A. He did.

Q. Do you remember when it was on that day?

A. I think it was after ten o'clock; it was in the morning.

Q. Did he at that time have the contract with him?

A. He did.

Q. Tell the jury what happened on that day, the 15th of August?

A. He came there and brought about $5,200—I will give you the exact amount if I can refresh my recollection by the slips—(Counsel hands witness slips, and witness examines them); he brought $5,232.39 of accounts, and he said to me, "Mr. Levison, I have a note to meet to-day of $3,000, and I would like very much for you to make me this advance." I told him, "As I told you on the
152 previous occasion, these accounts that you would bring over to us would have to be confirmed; however, as Mr. Solomon has known you for a length of time, and brought you in to us, I am perfectly willing to send out these accounts to-night, and not to make them out into an assignment until I get them verified; I will,

however, give you $3,000," and he said, "That will be entirely satisfactory; I am not particularly in need of money; if this thing hadn't come up I wouldn't have asked you for it at all."

Q. Did you at that time discuss with him the agreement.

A. Yes.

Q. Did he sign it?

A. He said, "That will be entirely satisfactory." I rang for Mr. Debolt and he came in, and I told him to give Mr. Fellerman a check for $3,000, "Take these accounts, get them verified, and let them go through the usual course of business." I turned these accounts over to him, and didn't speak any further with Mr. Debolt. Mr. Debolt went inside——

Q. Just a moment. I want to know about this agreement. When was this agreement signed?

A. It was signed that time—when he got the $3,000 check; it was filled in and Mr. Fellerman signed it.

Q. This handwriting; do you recognize that to be Mr. Debolt's; the dates, figures, and the amounts?

A. Yes, sir.

Q. In whose presence was that signed?

A. In the presence of Mr. Debolt and myself.

Q. At the time that Mr. Fellerman signed it was that figure "5" in it?

A. Yes, sir; most assuredly.

Q. And thereafter you say you gave him a check for $3,000?

A. Yes, sir.

Q. You have testified that you told Mr. Fellerman that you would not advance him any money until the accounts were confirmed; what do you mean by that.

A. Sending the accounts to the customers, stating every one to advise us if these accounts are correct, and if any returns have been made.

153 Q. Have you a regularly printed form of such notice that you send to the debtor?

A. Yes, sir.

Q. Is this (handing witness paper) the printed form that you employ in your business?

A. It is, and was at that time.

Q. And were such notices sent out in this case upon the printed forms?

A. Yes, sir.

Q. To the various debtors whose accounts were transferred to you?

A. Yes, sir.

The form above referred to is offered in evidence.

It is marked Defendant's Exhibit J.

Mr. Gainsburg reads it to the jury.

Q. Did you thereafter receive a number of replies from the various debtors whose accounts were assigned?

A. Yes, sir; later on.

Q. You also said in your testimony here that you would not make up the accounts; what did you mean by that?
A. Because the verifications had not come in.
Q. What do you mean by making them up?
A. If you will show me the assignment I can explain it better.

Counsel produces assignment to the witness.

Q. I show you Plaintiff's Exhibit 11 and ask you to state what that is?
A. That is the different accounts made up into an assignment; every account is written down stating the date of the account, the terms of each account, the time they are due, the net amount taking off the discount, and the gross amount in case they do not pay in time, so that they have to pay the gross amount.
Q. Is that what you mean by saying making up the account?
A. Yes, sir.
Q. And you said that on that day, August 15th, this account was not made up?
A. No, sir.

154 Q. I also understood you to say that when Mr. Fellerman signed the contract and told you that he had a note to meet of $3,000, you sent for Mr. Debolt?
A. Yes.
Q. What did you say to Mr. Debolt?
A. I told him to make out a check for $3,000, and that the bills go through the regular course of procedure.
Q. Did you then receive, or did you at that time receive from Mr. Fellerman the statements of the accounts aggregating $5,000 and some odd dollars?
A. Yes, sir.
Q. What did you do with those statements?
A. I handed them to Mr. Debolt.
Q. Did he leave your room and go into the general office?
A. Yes, sir.
Q. Where did Mr. Fellerman go?
A. He went with him.
Q. Do you know how long after that Mr. Debolt and Mr. Fellerman came back to your office?
A. In about ten minutes, I judge.
Q. Did Mr. Debolt have with him a check at that time?
A. Well, Mr. Debolt came back in about three to four minutes with the check, which I signed.
Q. (Producing check to witness.) He came back with the check, being Defendant's Exhibit I, dated August 15, 1905, for $3,000?
A. Yes, sir.
Q. Which you signed?
A. Yes, sir.
Q. What did Mr. Debolt do with that check?
A. I presume he handed it——
Q. Did he leave it with you?

A. No, he took it with him; I signed it, and he took it with him and went into the main office.

Q. After that did Mr. Debolt and Mr. Fellerman come back to your private office?

A. Yes, a few moments afterwards.

Q. Did Mr. Fellerman then talk with you?

A. Yes, sir.

Q. And what did either of them say to you at that time?

A. Mr. Debolt came in and said to me that Mr. Fellerman would like to have the currency on account of some deposit he wanted to make to meet a note; I called Mr. Fellerman in, and he stated
155 to me that this note was due to-day and "I should like to pay it, and you are giving me this check, and if I deposit it it might not reach my bank in time so as to keep this note from being protested, I should like it in currency," and I told Mr. Debolt to give him the currency, and Mr. Debolt went with him to the bank; it was just about lunch time , and Mr. Debolt dropped him at the bank, and he got the money and went off with it.

Q. Did Mr. Debolt go alone or did they go together?

A. They both came in about the same time.

Q. My question is whether Mr. Debolt and Mr. Fellerman both went down to the bank, or whether Mr. Debolt went alone and left Fellerman in the office.

A. I really don't know.

Q. Did you go to the bank with him?

A. No, sir.

Q. Did Mr. Fellerman endorse this check in your office?

A. That I don't know.

Q. Mr. Debolt would know that?

A. Yes, sir.

Q. You are in the habit of keeping a great deal of ready currency on hand?

A. Yes, sir.

Q. Did you on that day have $3,000 in currency?

A. No, we happened not to have it.

Q. Did they both come back after Mr. Fellerman received this $3,000.

A. No, I didn't see him.

Q. Did you at that time have any other conversation with him than what you have already stated?

A. No, sir.

Q. Did you say to Mr. Fellerman that for the equity that he had in the accounts he should buy stock in the company, and that he could then transfer that stock to his wife?

A. There is not one word of truth in it; no sir.

Q. Did you discuss with him the purchase of any stock of any kind whatever?

A. No, sir; no, sir.

Q. Did you talk with him about the equity in the accounts?

A. Not one word.

Q. Was there anything said about equity or stock?

A. Nothing.
Q. Were the notices sent out to the various debtors?
A. Yes.
156 Q. On that day?
A. The record will show that, if you will give me the record.

The record is produced to the witness.

Q. I show you this book and ask you to state what it is?
A. This is a book, as we invariably had——
Q. Tell us what it is.
A. This is a record of the mail that is being sent out every day.
Q. And can you state, after looking at that book, and has that book refreshed your recollection as to whether letters were sent out on the 15th day of August to these customers, whose accounts were assigned to you?
A. Yes, sir.

By Mr. ELKUS:

Q. Did you mail those letters yourself?
A. No, sir.

Mr. ELKUS: I object as incompetent.
The COURT: I understood him to say that he didn't send them himself.
Mr. GAINSBURG: No.
The COURT: Then he should say what the course of business is in his office.
Mr. ELKUS: If Mr. Gainsburg will say they were sent out I will concede it.
Mr. GAINSBURG: They were sent out on that day.
Mr. ELKUS: All right.

By Mr. GAINSBURG:

Q. Did Mr. Fellerman call on you again on the following day?
A. No, sir.
Q. Did he call on the 17th?
A. No, sir.
Q. On the 18th?
A. He did.
Q. What time of day did he call; morning or afternoon?
A. In the morning.
Q. Was there anyone with him in the morning?
A. I have a slight recollection that this gentleman who was
157 on the witness stand (indicating Mr. Woerbling) was sitting outside on a bench in the corridor, and just before the offices.
Q. Did you talk with him at all?
A. No, none at all.
Q. Were you introduced to him?
A. No, sir.
Q. Did you know who he was?
A. No, sir.

Q. Whether he was a lawyer or prospective son-in-law?
A. No, sir.
Q. What did Fellerman say to you at that time?
A. Well, he brought in another batch of accounts.
Q. How much?
A. I don't know.

Counsel hands witness paper which witness examines.

A. (continued). He brought in $2,495.50 worth of accounts.
Q. When you say he brought in accounts, did he have the statement with him?
A. Yes, sir.
Q. What conversation, if any, did you have with him on that day?
A. He said to me, "I should like to have some money." I said, "Mr. Fellerman, I haven't any confirmation yet on the first accounts that you gave us, and I told you at the time that we would not advance any money, unless we got this confirmation." He said, "Well, I will tell you; I have got a thousand dollars to pay to-day, and if you will accommodate me with that I will appreciate it very much." I said, "Well, I am going to have your account made up"; by that, I meant having these assignments made up. They are there (indicating).
Q. As per Exhibit 11?
A. Yes, and not having received any confirmation of any of them at that time, I said, "I will give my bookkeeper instructions to give you on those accounts that are rated 75 per cent., and on those that are not rated I will give you 50 per cent. and make up your account, and I don't want you to come here any more with any propositions of this nature, for I will emphatically not do business that way."
158 And I called Mr. Debolt and told him to make up the accounts; I assorted the accounts in the manner I have stated, giving 50 per cent. on some and 75 per cent. on some others, and told him to adjust the first accounts.
Q. Did Mr. Debolt do so, and did he bring in these statements to you?
A. Yes; he brought in the others that day, I presume he has duplicates of them.
Q. These are copies?
A. These are copies, I presume.
Q. In whose handwriting are these?
A. Mr. Lewis's handwriting.
Q. As of what day were these accounts made up?
A. The 18th.
Q. It was all made up as of the 18th?
A. It was all made up as of the 18th; yes, sir.
Q. And there were two statements, one figuring the gross accounts at $5,232.39, and the net as $5,025.45; and the gross accounts on the 18th $2,495.50 and the net amount $2,379.30. And then there appeared the figures 75 per cent. equals $3,000; 50 per cent. $2,025.45. —. ——.
Q. How much did you advance him on that date?

A. The records will show; or Mr. Debolt can state that.

Q. (Producing records to witness.)

A. (continued). He received on August 15th $3,000 and on the 18th one sum of $267.73 and $1,125.

Q. And for these last two sums he gave you the receipts which have been referred to on Mr. Fellerman's examination?

A. Yes, sir.

Q. They were not signed in your presence?

A. No, sir.

Q. Mr. Debolt attended to the receipts and to the payment of the money?

A. Yes, sir.

Q. Coming back to the first transaction of $3,000; what, if anything, did you instruct Mr. Lewis to do when you received the first batch of accounts with reference to calling at Fellerman's place of business?

A. Mr. Fellerman only brought in one statement—I told him——

159 Q. Do you mean a statement containing one account?

A. No, of one account one statement; we needed two.

Q. We still don't understand it; you say he brought in a batch of accounts, but one statement only of each one?

A. Yes, we told him that we would have to have two statements; one a duplicate for our records with his assignment on the back, and one of them stamped, "Payable to us," to be sent to the customers; I told Mr. Debolt to send Mr. Lewis up there and get the duplicate of these accounts, and at the same time, as it is always customary with us, either to instruct the client or we ourselves to go there and stamp the account that it is our property; that it has been assigned to us.

Q. Do you know whether Mr. Lewis copied these statements at your office, or whether he copied them at the office of Fellerman?

A. He must have copied them at Fellerman's office.

Q. Because he got the duplicates there?

A. Yes.

Q. But he had with him and you gave him these single statements that were brought to you by Fellerman?

A. Yes, sir.

Q. In addition to the agreement that was signed August 15, is it also the custom and was it done in this case, that each separate statement is stamped on the reverse thereof that it has been assigned to you, and then signed by the customer?

A. Yes.

Q. Was that done in this instance?

A. Yes, sir.

Q. In other words, every one of the statements brought by Fellerman was stamped this way, and signed by him, both on the 15th and 18th of August?

A. Yes, sir.

Q. That was done by your office?

A. Yes, sir.

Q. Now, on the 18th of August, after you figured out the 75 per

cent. on the accounts that were rated, and 50 per cent. on the accounts that were not rated, you say you gave Mr. Fellerman cash for $1,125 and $267.73?

A. Mr. Debolt gave him that.

Q. Did you also at that time figure out what your com-
160 mission at the basis of five per cent. amounted to?

A. Yes, sir.

Q. What did that, upon the gross amount of these accounts, amount to?

A. $386.40; one account is $261.82 and $124.78; that is $386.40.

The papers are shown to the jury.

Q. Did you at that time receive the commission of $386.40?

A. Mr. Debolt is better able to tell that.

Q. You were paid your commission?

A. Yes, sir; we were paid our commission.

Q. And so it appears on your books as paid on that day?

A. Yes, sir.

Q. Which book shows that?

A. The record and also the cash book.

The books above referred to are produced to the witness.

Q. I show you this book and ask you to state whether that is the cash book just referred to by you?

A. Yes.

Q. What is the date at the top of the book?

A. August the 18th.

Q. Is there an entry there of the payment to you of the commission?

A. Yes, sir.

Q. What entry is there with reference to Fellerman's account?

A. The commission, A. Fellerman & Son, $261.62; and $124.78.

Q. What reason was there, if any, for separating these two amounts?

A. Because there were different accounts; the one batch that he brought in on one day we made up on one assignment, and the other batch that he brought in we made up on the other assignment.

Q. In other words, you made up two such separate statements?

A. Yes.

Q. Is there a similar entry with reference to these claims in this other book?

A. Yes, sir.

Q. What book is that?

A. The record.

Q. What do you call it?

A. A record book giving the record of the man's account.

161 Q. Do you know whether Fellerman paid you that commission, or whether it was retained by Mr. Debolt out of the cash moneys that were to be given to him on that day.

A. Well, that I don't know.

Q. But, whichever way it was done, the money was paid to you on that day?

A. Yes, sir.

Q. And the balance was turned over to Mr. Fellerman?

A. Yes, sir.

Q. Did you, on that day, have any talk with Mr. Fellerman concerning his solvency or insolvency?

A. No, sir.

Q. Did he tell you then that his creditors were pushing him?

A. No, sir.

Q. Did he then repeat again that he was short in the bank?

A. No, sir.

Q. Did he say anything at all about his condition?

A. No.

Q. Did you ask him?

A. No, sir.

Q. So that you knew nothing at all about his condition other than the investigation that you made by looking at Bradstreet's and Dun's books, and the statement made to you by Mr. Solomon and the statement made to you by Mr. Fellerman that he, on the first day, needed to pay a note?

Objected to. Objection sustained. Exception.

A. And his statement that he was worth $50,000 to $60,000.

On motion the question is withdrawn and the answer stricken out.

Q. Did you do this figuring in the presence of Woerbling, or where was Woerbling; was he in the room?

A. No, sir.

Q. On that day did you state either for the first time or the second time anything to Fellerman about buying stock?

A. No, sir.

Q. Did you in the presence of Woerbling or in the presence of Fellerman suggest or advise the purchase of stock for this equity?

A. No, sir.

162 Q. And that afterwards the stock could be transferred to the wife or daughter?

A. No, sir; not one word.

Q. And did you after that see Fellerman again?

A. Yes.

Q. When.

A. He called. I had just returned from lunch; it must have been about half-past one or two o'clock; I don't remember exactly the hour; perhaps a little later; as I was coming in he was sitting there and said: "Mr. Levison, I should like to have some more money. This money that I got this morning I had to pay out, and I need some for the payroll." I said: "I told you already this morning that I wouldn't give you any more money unless I got these accounts confirmed, and I emphatically decline to anticipate any more. If you wish to leave these accounts here I am perfectly willing to make you advance on those, and give you 25 per cent additional

after the 50 that we have given you in the morning; but I must emphatically decline business of this nature, where a man comes in here every few minutes without his accounts being confirmed," and he said: "I will do so"; so I went into my office and attended to some business and came into the main office then and asked if Mr. Fellerman had left the accounts, and they told me no, and I said nothing further.

Q. Did you at that time have any business relationship of any kind with Mr. Bronner?

A. I didn't know him; no, sir.

Q. When did you first become acquainted with him?

A. I guess about a year ago.

Q. Did you, or did anyone for you at your request, telephone to Mr. Bronner that he should telephone to Fellerman that he discounted accounts with you?

A. No, sir.

Q. Either on the 15th or any time between the 15th and 18th or on the 18th?

A. No, sir.

Q. Did Bronner ever do any business with your firm?

A. No.

163 Q. You say you didn't know him until about a year ago?

A. No.

Q. When did you learn of the failure—that is, of the bankruptcy proceedings that were instituted against Fellerman & Son.

A. I saw it in the paper on Monday or Tuesday.

Q. What did you do?

Objected to as immaterial, irrelevant and incompetent.

Mr GAINSBURG: I want to prove by this witness what he did after the proceedings were instituted with reference to these accounts.

Mr. ELKUS: All right.

A. I instructed Mr. Debolt to made out statements of accounts as I had not received any confirmation, and turn them over to Mr. Ralph Nathan, and that he should notify the customers, or do whatever he could to get us our money.

Q. Who is Mr. Ralph Nathan?

A. He was our attorney.

Q. Attending to some matters for you?

A. Yes.

Q. And his office was 53-63 Park Row?

A. Yes, sir.

Q. And were such statements prepared?

A. Yes, sir.

Q. And were they sent over to Mr. Nathan?

A. Yes, sir.

Q. Was that also in accordance with the practice and custom in your office.

A. Yes, sir.

Q. That in the event of a failure——

Objected to. Objection sustained. Exception.

Q. Did you do that only in this instance, or in other instances where a like condition occurred?

A. In every instance.

Q. And you don't know what efforts or work Mr. Ralph Nathan did other than the sending out of the statements?

A. No.

Q. What payments did you make to Mr. Nathan for the
164 services that he rendered?

A. Mr. Nathan's bill will show, and the record book will show.

Q. How much was the bill he rendered to you?

A. I don't remember now.

Objected to.

Q. How much did you pay?

A. (Referring to receipts.) $311.99, and $32.78.

Q. That was on what basis?

A. Ten per cent.

Q. Are these the receipts that you received from Mr. Ralph Nathan for this money.

A. Yes, sir.

The receipts, being five in number, are offered in evidence. They are marked as one exhibit, Defendant's Exhibit K.

Q. In your opinion was that a fair and reasonable charge?

Objected to on the ground that the witness is not competent to testify.

Mr. GAINSBURG: Not as an attorney, but simply as a merchant, as a man of business.

Q. Did you agree to pay that ten per cent?

A. Yes, sir.

Q. Can you tell by looking at your records how much altogether you collected upon these accounts?

A. Yes, sir.

Q. How much did you collect upon these accounts?

—. The record will show. (Refers to record.) We collected $5,612.71; you can see it on page 190.

Q. Can you state what was the postage?

A. Sundries, $12.09.

Q. Is that postage?

A. It is included in the $12.00.

Q. What is the interest?

A. $18.17.

Q. So that from the moneys that you collected you paid out, there was the advance of $4,006.33 to Fellerman, and what
165 was the total amount advanced to Fellerman & Son; was it not $4,006.33.

A. I have it here.

Q. Is it correct; together with the commission it amounts to $4,392.73?

A. That is correct.

Q. In addition to that there were the $18.17 interest, $12.09 postage, etc., and $344.77 that you paid out for attorney's fees?

A. Yes, sir.

Q. And in addition to that you paid the trustee of Fellerman $767.33?

A. Yes, sir.

Q. Making a total outlay of cash for advances to Fellerman, payment to receiver, together with attorney's fees of $5,612.71. Was that the total amount collected by you?

A. Yes.

Q. Now, in addition to this total amount collected of $5,612.71, and disbursed in the manner in which you have indicated, what became of the balance of the accounts uncollected?

A. They were assigned to the receiver.

Q. You mean Mr. Van Iderstine, the trustee?

A. Yes.

Q. There is an item of an overpayment of $77.62; what is that item.

A. That is the customers having sent us more money than the account assigned to us by Fellerman.

Q. What did you do with that?

A. We paid that over—there were two items; one for $59.69 and one for $17.93, and this we paid by two checks to Epstein Brothers.

Q. And that you denominate as overpayment?

A. Yes, because it didn't belong to us.

Q. Does that explain the disposition of every dollar that came in your hands?

A. Yes, sir.

Q. You were examined concerning this transaction by Mr. Rosenberg?

A. Yes, sir.

Q. On March 29, 1907, at your office?

A. Yes, sir.

Q. And you had the books with you at that time?

A. Yes.

Q. And those books were exhibited to Mr. Rosenberg.

A. Yes.

166 Q. Since that examination you have talked with me about the case?

A. Yes, sir.

Q. And your memory has become refreshed on many of these transactions?

A. Yes, sir.

Q. Within what period of time, if you recall, was this $5,600 and some odd dollars collected?

A. The record will show that; I can't tell it off-hand; at that time we had the books there, and I think we could tell from the statements; October the 14th.

Q. By September the 27th you had collected over $4,200?

A. Yes, sir.

Q. And by October the 14th you had received over $4,800?
A. Yes, sir.
Q. Was that the only account that you charged the five per cent?

Objected to. Question withdrawn.
Mr. ELKUS: No, I withdraw the objection; you may ask him.

A. Oh, no; we have other records.
Q. Other clothing accounts.

Objected to. Objection overruled. Exception.

A. Yes, sir.
Q. And other women apparel accounts?
A. Yes, sir.
Q. Mr. Solomon testified this morning that he had some shares in the stock which he said cost $500; how many shares has he got?
A. Five shares of $100 each.
Q. And they are preferred stock?
A. Yes, sir.
Q. Do any number of shares of common stock go with the preferred stock?
A. No, sir; none at all.
Q. Each one has a separate value?
A. Yes, sir.
Q. And Mr. Lewis testified that he had some shares of stock in the company?
A. Yes.
Q. And that he acquired them some two or three years ago.
A. Yes, sir.
167 Q. And that was paid for also?
A. Yes, sir.
Q. Have you made any agreement with Mr. Lewis or Mr. Solomon to return the moneys to them?
A. No, sir.
Q. Have you offered any of the stock of your corporation for sale on the market?
A. No, sir.
Q. As a matter of fact it is a sort of a close corporation?
A. It is.
Q. And you are now the holder of how much stock of that company?
A. Of 85 per cent.
Q. Did you have any knowledge, or did Mr. Fellerman tell you anything about any transactions with Gordon?
A. No, sir.
Q. After the bankruptcy proceedings you received a notice from some attorney, Marx & Brothers, with reference to this claim of Gordon's, did you not?
A. Yes, sir.
Q. I show you a letter and ask you to state if that is the letter which you received on September 12, 1908?
A. Yes, sir.

The letter is offered in evidence.
It is objected to as immaterial and irrelevant.

The COURT: He said he didn't know anything about Gordon until after the failure, and that seems to me enough.
Mr. GAINSBURG: But Mr. Van Iderstine testified about what there was, about the $767, whether he had any difficulty in getting it, or whether he had to sue the National Discount Company; I want to show that the reason they didn't make an immediate payment was because there was this adverse claim by Gordon?
The COURT: It is immaterial, but I will allow it if you will be brief.
The letter is read to the jury.
It is marked Defendant's Exhibit M.

Q. Did you thereafter receive any communication from the receiver or trustee?
A. Yes, sir.
Q. Did you at any time refuse to turn over the equities in your hands to the receiver?
A. Never.
168 Q. Did you acquaint the receiver with this claim upon this equity?
A. Certainly.
Q. And thereafter the receiver served you with the following paper which is an order dated February 14, 1907, that the National Discount Company paid to Robert Van Iderstine, Trustee, the sum of $767.33, and which is based upon an affidavit of a clerk in the office of James, Schell & Elkus.

The paper is offered in evidence.
It is marked Defendant's Exhibit N.
Mr. Gainsburg states the contents of the paper to the jury.

Q. And the check was drawn February 19, 1907, for $767.33?

Cross-examined by Mr. ELKUS:

Q. You are a business man of experience?
A. Yes, sir.
Q. And have been in business, I think you said, in answer to your counsel, since 1903 or 1904?
A. 1904.
Q. And prior to that you were engaged in some other business?
A. Yes, sir; mercantile business.
Q. How long have you been in business here?
A. Twenty-five years.
Q. And prior to that elsewhere?
A. Yes, sir.
Q. Whereabouts?
A. At Nashville, Tennessee.
Q. And your business was manufacturing clothing?
A. No, sir.

Q. Manufacturing what?
A. Shawls.
Q. Manufacturing some kind of clothing?
A. Yes, sir.
Q. You have been familiar and were familiar with the methods used by business men in this City in their business?
A. Yes, sir.
Q. How they obtain money from banks?
A. Yes, sir.
Q. Banks make a rule, do they not, to advance money to their customers?
A. To some.
169 Q. Customers who have good credit?
A. Yes, within limited amounts.
Q. According to the amount of their balance?
A. Yes, sir.
Q. And according to the amount of business they do?
A. Certainly.
Q. And the fact is that banks of this City rather run after customers, don't they?
A. They do, providing they don't borrow.
Q. Don't they want to lend money?
A. Not very often.
Q. Do you mean to say that the banks here are not anxious to lend money to good people?
A. Oh, yes, to good people.
Q. Don't they, when money is cheap, run after people to get it?
A. Yes; but it isn't run after much now.
Q. In 1905 money was cheap?
A. I don't recollect it now.
Q. Don't you?
A. No.
Q. You were a banker?
A. Yes, sir.
Q. You were borrowing money yourself?
A. Yes, sir.
Q. From your own bank on your own paper?
A. Yes, sir.
Q. Without security?
A. Yes, sir.
Q. And don't bankers employ brokers all around and ask people to take money from them, the security being only upon their promissory notes?
A. Yes, sir; and they must be very large concerns.
Q. That is your experience, is it?
A. That is my experience.
Q. Of course, if you had for a moment imagined that Mr. Fellerman was going into bankruptcy the day after he was at your office, you most assuredly would have refused to do any business with him?
A. Most assuredly.

Q. You don't want to be mixed up with anything like that?
A. No, sir.
Q. And if you had dreamed for a moment that he was anywhere near insolvent, you would have sent him out; or, if any circumstance was called to your attention that would have made you suspicious about his financial standing, you would have refused to do business with him?
170
A. We should.
Q. And would your refusal and your attitude, as you have explained it to me, be because you would think it was improper?
A. Improper?
Q. Yes?
A. To lend him money?
Q. Yes, under those circumstances?
A. Well, I wouldn't have done any business with him at all.
Q. And the reason you would have refused to do business with him would be because you recognized now, and did then, that such transactions would be improper?
A. Yes.
Q. And if the slightest circumstance was called to your attention which would have led you to believe it was improper, you would have immediately shown him the door?
A. Most certainly.
Q. Your counsel, just as he about finished your examination, called your attention to your examination taken in March, a year and a half ago?
A. Yes, sir.
Q. This was within a comparatively short time after the transactions, wasn't it?
A. A year and a half after.
Q. And, if anything, your recollection of what took place would be clearer then than now?
A. I don't think so.
Q. You have read your examination very carefully?
A. Not very carefully, I am sorry to say.
Q. Carefully, without the "very"?
A. Yes.
Q. You had these accounts at that time, and you found, did you not, that you were able to recollect a great deal more now than you did when you were examined on behalf of the trustee or the referee a year and a half ago?
A. I don't know as I remember anything more now; but Mr. Rosenberg called at my office, and I had several other things to attend to perhaps, and we simply went over the thing in a mere matter superficially; that is all; and, of course, since this case
171 first came up I have given the matter quite a study, because there is a question of principle involved in this thing, as well as a money question.
Q. It was at your request that you were examined at your office instead of in Court?
A. Yes, sir.

Q. You knew that you could be brought to Court and made to testify?

A. Yes, sir.

Q. And you asked that the examination take place at your office because you desired to avoid the possibility?

A. That is right; that you did.

Q. And we acceded to that desire on your part?

A. Yes.

Q. You had there all your books and papers and accounts?

A. Yes, sir.

Q. You were asked with reference to this transaction in detail?

A. Yes, sir.

Q. Substantially the same questions as were asked you by your counsel here to-day?

A. Yes, sir.

Q. And you referred to your books and your papers and your accounts then even with more detail than you did now?

A. The same thing; yes, sir.

Q. And you were accorded every privilege with regard to your testimony, which you haven't got now?

A. Yes, sir; that is so.

Q. The testimony was taken down by a stenographer?

A. Yes.

Q. And it was written out afterwards and sent to you to read?

A. Yes, sir.

Q. And you made corrections and additions and interlineations in your own handwriting, as you saw fit?

A. Yes, sir.

Q. So that it was done with great care?

A. Yes, sir.

Q. Much more so than when a witness testifies in Court?

A. Yes, sir.

Q. You have testified a number of times, haven't you?

A. No.

Q. Only once?

A. No, I don't think I have ever testified three times in my life.

172 Q. Wasn't your recollection refreshed by any other books and papers than you had when Mr. Rosenberg examined you at your office?

A. No.

Q. What refreshed your recollection?

A. The books are here now, and they are the same check books.

Q. No. What refreshed your recollection since your examination at your office?

A. I have simply thought the case over; thought over all the transactions that took place, and how they took place and everything of that kind.

Q. Counsel explained to you the allegations and charges you would have to meet, didn't he?

A. No, I don't think that he did.

Q. Didn't you know what you would have to meet; yes or no, if you can?

A. Yes.

Q. I only bring this up because your own counsel in examining you said that your recollection had been refreshed since you were examined; that is correct isn't it?

A. Yes.

Q. When Mr. Fellerman came to you the first time he said that he wanted somebody to finance his business, to take of his credit?

A. His customers' credit.

Q. Well, those were the only credits he had?

A. Oh, yes; he had also his credits.

Q. Take care of his business relations and take care of his office; is that right?

A. The office work, the bookkeeping.

Q. And collect his accounts?

A. Yes, sir.

Q. Now, take up the first thing that you said; you agreed to do all these things?

A. Yes, sir.

Q. That was your business?

A. Yes, sir.

Q. To take care of his customers' credits meant looking up—submitting to you the name of every customer before he shipped them after he took the order, and sending it down to you, and your examining that man's credit, and then notifying him whether to sell or not?

A. Whether to ship or not.

Q. Taking care of his office work meant keeping his books?

A. No, keeping our books.

Q. Well you keep your own books anyhow?

173 A. Well, I know; but we keep his accounts entirely separate.

Q. When you said doing his office work, you mean keeping his account with you in your books?

A. Yes, sir.

Q. And that was all you offered to do?

A. Yes, sir.

Q. Well, that you had to do anyhow, didn't you?

A. Well, we have a system.

Q. Can't you say either yes or no?

A. Not without an explanation. We have a system where we keep each client's accounts separate, so that he can come in daily and look over his accounts; see just exactly how much money has come in and how much collateral we are holding and how much equity there is due him, how much commission he has paid and how much interest, and anything of that kind; he can do that——

Q. And they are always written up and always ready?

A. Yes, sir, always written up and always ready; and we also have his books kept in the same manner as ours; his books that he keeps himself, and whenever his books and our books do not tally

together our bookkeeper at once goes over there or they come to us, and we examine where the errors lie, and have a daily report about it.

Q. In every business that you know of isn't an account kept with every customer?

A. Yes, but it is kept in total; together.

Q. Isn't every item put down for every customer that he buys or sells or pays or gets?

A. Yes, sir.

Q. And isn't it kept on a separate page in the ledger?

A. Yes, sir.

Q. And can't anybody come and see it any time they like, if they are authorized?

A. Yes, sir.

Q. Besides that you said you would collect all his accounts?

A. Yes, sir.

Q. Was there anything else you were to do?

A. Yes; he was to advise with us, and we were to check his credits; that is about all.

Q. What advice were you to give him.

174 A. In case he wanted to solicit any account or we had some account that was slow on another man's account, that we would tell him not to ship; because we had perhaps ten thousand accounts on our books.

Q. Would you advise with him about the conduct of his business?

A. If he came there for any such advice I would.

Q. Give him advice as to his finances?

A. Yes, if he came and asked me to.

Q. How to get money?

A. Yes, sir, he didn't have to get advice on that, because he could get all he wanted from us, if he had the accounts.

Q. But you didn't intend to give him any money except he gave you security for what he got?

A. Well, I can't tell you that; he might have run with me six or seven months, and if he needed $5,000 and everything looked prosperous I might have given it to him without accounts.

Q. And the agreement that you made was meant to embody the entire conversation you had with him?

A. Yes, sir.

Q. And everything you said that you would agree to do was in that paper?

A. Yes.

Q. You were to advance money yourself to him?

A. Yes.

Q. You agreed to do that?

A. Yes, sir.

Q. The first time he came there I understand was early in August?

A. About the 10th, or 11th, I think, of August.

Q. He came in and said that he wanted somebody to finance his accounts?

A. Yes, sir.
Q. And do what you have told me just now?
A. Yes.
Q. And you had this general conversation?
A. Yes.
Q. And he told you who he was?
A. Yes, sir.
Q. And told you the names of the members of his firm?
A. Yes, sir, I believe he told me; I am not quite sure; I think he said his son was in business with him.
175 Q. You were going to finance him for a period of time, and were very much interested to know all about him?
A. Yes, sir.
Q. And he told you the character of his business?
A. Yes.
Q. And the amount of his sales?
A. Yes, sir.
Q. Did he tell you how much he was worth?
A. Yes, sir.
Q. How much did he say?
A. Between $50,000 and $60,000.
Q. Net?
A. I don't know if he said gross or net, but that was what he volunteered.
Q. You understood that it was net?
A. Yes, sir.
Q. Gross doesn't mean anything at all, does it?
A. No.
Q. Did he tell you where his place of business was.
A. Yes, he handed me a card.
Q. And then you told him at that time you would charge him five per cent.?
A. Yes, sir.
Q. Five per cent. on every dollar of accounts assigned to you?
—. Yes, sir.
Q. Irrespective of any amount advanced on it?
A. Yes, sir.
Q. So that if he assigned to you $10,000 worth of accounts, or if he assigned to you $20,000 worth of accounts and then borrowed $1,000 he would have to pay you 1,000?
A. Oh, no; I was to advance him 75 per cent.
Q. Suppose he didn't take it?
A. Then he wouldn't need me; he wouldn't bring the accounts in.
Q. Suppose he brought to you $20,000 worth of accounts, and you didn't pass on any of them, except you said, "I can't lend you more than a certain percentage of these accounts"; he would still have to pay?
A. No, he wouldn't; I would only take so much as would make the 75 per cent. that I intended to give him; that very often occurs.

Q. In this particular case, when he came to you the second time, he brought to you accounts that aggregated over
176 $2,500, didn't he?
A. About $2,200
Q. And he only got a thousand dollars?
A. Yes, sir.
Q. That was less than fifty per cent.?
A. Yes.
Q. And still you charged him five per cent. on the $2,200?
A. Yes, sir.
Q. And collected it as soon as he got the thousand dollars?
A. Yes, sir; shall I explain?
Q. No; that is all the explanation I want. Then he said to you—you said, "I want five per cent.," and he said, "Well, I have got $125,000 to $150,000, and that is too much money"?
A. Yes.
Q. And then you said, "Well, I am willing to agree, and I do agree that if you do $100,000 or more I will give you a rebate of two per cent."?
A. Yes, sir.
Q. That meant at least $2,000 a year, if he did $100,000 worth of business, and it was a very important thing for him, wasn't it?
A. Yes, sir.
Q. And you recognized it as such?
A. I did.
Q. Was that at the first interview, or the second?
A. That was after Mr. Solomon was there.
Q. That was the second interview when Mr. Solomon brought him down, that you talked about the rebate?
A. Yes, sir.
Q. And before the agreement was signed?
A. Yes, sir.
Q. Why didn't you put that in the agreement?
A. Which?
Q. The two per cent.?
A. I don't know why; it must have been Mr. Debolt's fault; that is all; I didn't pay any attention to it, and my word would have been perfectly sufficient.
Q. Did you tell Mr. Debolt to put it in?
A. I presume I did.
Q. Don't you know?
A. Well, as far as I can tell you, yes; because that was what I told him, and I told Mr. Debolt the arrangement.
177 Q. Did you ever tell anybody anything about this two per cent. rebate until to-day?
A. Most assuredly.
Q. Whom did you tell?
A. Mr. Debolt knew about it.
Q. Anybody else?
A. Mr. Lewis knew about it.
Q. Anybody but your two employees?

A. I had no occasion — tell it to anybody else; I wouldn't come here and tell you or his Honor; I had no occasion to speak about the subject.

Q. Why didn't you tell it in March, 1907, when you were examined?

A. The question was not asked of me.

Q. Weren't you asked to tell the facts of the transaction and what took place?

Objected to on the ground that the record is the best evidence of what this witness was asked.

Mr. ELKUS: This is cross-examination.

Mr. GAINSBURG: But there is a written record here, and that appears.

Objection overruled. Exception.

A. Yes, sir; I don't think the question was asked of me at all.

Q. Weren't you asked to tell everything that took place between you and Mr. Fellerman with reference to that transaction?

A. Yes, sir.

Q. You forgot it, *don't* you?

A. I don't know if I forgot it; I might not have thought about it at the time; that is all.

Q. Now, about the stock of your company, your common stock is practically valueless, isn't it?

A. It is worth one hundred cents on the dollar, and paid for dollar for dollar

Q. You have got $500,000 of preferred stock?

A. Yes, sir.

Q. And the $500,000 of preferred stock is a first lien on every asset of the company?

A. Yes, sir.

Q. And the dividends on that preferred stock are guaranteed, and are cumulative?

A. Yes, sir.

178 Q. And they are six per cent. per annum?

A. No, they are five per cent. per annum.

Q. Then Mr. Lewis didn't know what he was talking about?

A. No, sir, we are paying five.

Q. Any you never have paid a dividend on your common stock?

A. No.

Q. How many stockholders are there that own more than five shares of stock besides yourself?

A. Quite a few.

Q. Who are they?

A. I don't know that it would be proper, but I can bring it here in the morning; perhaps twenty.

Q. Are they relatives?

A. No, sir.

Q. Friends?

A. Well, I can't say friends; acquaintances.

Q. Do you say that your common stock is worth par?

A. It is; it has been paid for; par.

Q. And in the four years that it has been in operation it has never paid a dividend?

A. No, because the surplus is standing there; we have a surplus to-day.

Q. Whatever is done you practically control the company, don't you?

A. I do.

Q. Whatever you say goes?

A. Well, I don't know; we have some other parties who speak.

Q. Do they ever speak when you are around?

A. Oh, yes, they do.

Q. Are they heard?

A. Yes.

Q. Did you know that Fellerman couldn't read or write, except his name.

A. No, sir; I did not know.

Q. Did you see him read this paper?

A. Yes, sir, he held it in his hand, and I thought he was reading it all the time; it was the first time when he said yesterday that he couldn't read, that I knew it.

Q. And you thought he read this paper and realized as he read it that the paper exactly portrayed what you had agreed to do?

A. I presume he took it home and consulted with his son.

179 Q. Will you kindly take this paper and tell me first where it shows that you agreed to do anything?

Objected to because the paper speaks for itself.

The WITNESS: It says "The Banker agrees to secure funds and advance same to the Customer from time to time 75 per centum of the net face value of such accounts as may be accepted by the Banker, upon the following terms and conditions."

Q. I am asking what you do?

A. That is what I do; when he submits them to me that is what I do.

Q. I mean what the paper says; you say first "the Banker agrees to secure funds and advance same to the Customer from time to time"; why do you use the words—instead of saying "the Banker agrees to lend money," why do you say "the Banker agrees to secure funds"?

Objected to. Objection overruled. Exception.

Q. Don't you know what it means to agree to secure funds, instead of agreeing to lend money? Do you realize that there is a difference?

A. Yes.

Q. What is the difference?

A. Well I can't just give you an explanation of it; I am not legally versed in the matter.

Q. Isn't it a fact that the jury are to understand that the agreement was so drawn that even you didn't understand it?

A. Well, I don't understand it.

Q. What does it mean, then?

A. In case, at any time, I didn't have any money I would go out and get money for him.

Q. Where does it say that? Does it say in any case that you will give him the money yourself?

A. Yes, I will secure the money for him.

Q. Were you to be a broker or a banker?

A. A broker; I am as well a broker as I am a banker. For instance: last fall no one had money and I had to go out and
180 get the money and these people paid me a commission for getting the money whenever they needed it.

Q. So you weren't to advance your own money, then?

A. If I had my own I would advance it, but if I didn't—I couldn't tell the men that I hadn't got money; I had to get to work and borrow it.

Q. So you agreed here only to secure the funds.

A. Yes.

Q. Do you realize that if you said, "I can't secure the funds," that he had no remedy against you?

Objected to as calling for a conclusion and construction, and asking the witness to pass upon legal rights. Objection overruled. Exception.

A. He had a remedy by not coming to me.

Q. I mean after he tied himself up to you by signing this paper, don't you realize that by simply saying, "I can't secure the money," that that was all he could do?

A. No, sir; I don't realize that.

Q. Wasn't this paper drawn with that intent in view?

Objected to as calling for the operation of the witness's mind. The agreement speaks for itself. Objection overruled. Exception.

A. I don't think so.

Q. Do you know of any other intent with which the paper could have been drawn.

Objected to as incompetent, irrelevant and immaterial, and calling for the operation of some one's mind not disclosed. Objection sustained. Mr. Elkus excepts.

Q. You had liberty to reject any account that he brought to you under this paper?

A. Yes, sir.

Q. Without assigning any reason for it?

A. But I wouldn't make him any charge.

Q. But you could refuse to take it?

A. Yes, sir; we do that very often, and don't charge them anything for it either.

181 Q. Outside of this five per cent. which he was to pay you on all the accounts, he had to pay you for every penny of postage that you expended?

A. Yes, sir.

Q. He had to pay you for every dollar that you spent for collecting the claim?

A. If I gave that to an attorney; yes, when I did.

Q. What did you mean by saying to the jury that you were going to collect those accounts?

A. If he stayed in business I would attend to his collections; sending out statements to the customers or sending somebody there, if it was in the city.

Q. And if a lawyer had to write a letter you would charge ten per cent.?

A. Well, he wouldn't have to write any letters; we could collect them ourselves.

Q. There was no necessity for it?

A. No, there was no necessity for it.

Q. In this paper which I show you does it say anything about attorneys' fees?

A. I think it does somewhere in here.

Q. It ought to be in Clause 5?

A. Yes, Clause 5.

Q. Every expense incurred by you was to be paid by the customer in addition.

A. Yes, sir—no, only attorneys' fees; only to the attorney or such expense that may come up.

Q. You have these papers printed from time to time, do you?

A. Well, we haven't had any printed for quite some time; I think there is an errer——

Q. One minute. I show you a form which was furnished to me, or a copy of this; that is a little different from this one?

A. Yes, sir, because he has got it here "attorneys' fees."

Q. In small type?

A. Yes.

Q. Was that since this action was brought?

A. Oh, no; I don't know if it was or not; this is a different contract from the other one altogether.

Q. Is it?

A. I suppose so; isn't it? No, that is the same contract; it may be an error of the printer.

Q. You think that the printer made the error.

A. I think there might be.

Mr. ELKUS offers in evidence Plaintiff's Exhibit 12.

182 Q. Was this copy given to Mr. Rosenberg when he examined you in your office as being an exact copy?

A. I don't know if it was or not; if Mr. Rosenberg says it was——

Q. You don't know what this attorney did, do you, Mr. Nathan?

A. No, I do not.

Q. Is Mr. Nathan in court?

A. Yes; that is the gentleman I refer to (indicating).

Q. And he is the man that can tell what he did?

A. Yes, sir.

Q. And we asked you to tell what he did?

A. Yes, sir.

Q. And didn't you say that he had the only correspondence?

A. No, I didn't.

Q. (Producing letter to witness.) Is that your letter, and did you write it and sign it and send it to us, as the truth.

A. Yes, I sent it to you as the truth; that is my letter. You asked me for correspondence in the matter and I wrote to Mr. Nathan about it and he simply told us that he had no correspondence in the matter, and this letter states that he has no letters or correspondence in connection with this case; all moneys received were turned over to us, and the other accounts he has neither heard from them or anything else, and he admits that he had better communicate with the debtors.

Mr. ELKUS offers in evidence the letter above referred to.

It is marked Plaintiff's Exhibit 13.

The letter is read to the jury.

Q. Do you know whether or not Mr. Nathan did a single thing except write to a few of these people?

A. I really can't tell you what he did in the matter.

Q. You didn't inquire of him at all, when you paid his bill; in his bill to you he said, "To collections in the Fellerman case"; and "Total $3,119.96 at 10 per cent, $311.96"; that is all you know about it, isn't it?

A. That is all I know about it except to look it up to see if the amounts were correct.

183 Q. Was this bill paid by check or in cash?

A. That I can't tell you either, but our records will show that.

Q. Well, all regular business would pay a bill like that by check, unless they had something to hide about it?

A. We wouldn't have these receipts if we wanted to hide anything about it, would we?

Q. Yes, if you ask me the question, I would. Ask me questions and I will answer them; otherwise I will keep quiet. These receipts; can you tell whether they were for checks or for cash?

A. Those are cash receipts; Mr. Nathan undoubtedly called during this time——

Q. I haven't asked you that at all; every one of these payments made to Mr. Nathan were for cash payment; is that right.

A. That is right—I won't be positive unless we look up the records. If his payments were made all by cash or check; these are cash slips; if the entire payments of $311 were made by check or by cash I am unable to tell, unless the bookkeeper looks up the record on this account; we will be able to tell you.

Q. But every payment on these slips was cash?

A. Every payment on these slips were cash.

Q. $221, $49, whatever they were; how many bank accounts did you have?

A. Oh, perhaps three or four.

Q. How many bookkeepers?

A. About four or five.

Q. There was no trouble about having somebody to make out checks?

A. I don't understand your questions; we have only one man that makes out these slips; Mr. Debolt or Mr. Lewis—if that is Mr. Debolt's handwriting, Mr. Debolt made that out, and Mr. Lewis made it out if it is his handwriting.

Q. Will you explain how there are five slips for five different payments when there are only two bills?

A. What do you mean by two bills. I have already explained to you——

Q. No, I ask you to answer my question.

184 A. Mr. Nathan, like a few young lawyers will do, having a case and being an attorney,——

Counsel moves that, "like a few young lawyers will do" be stricken from the record.

Motion granted.

A. (Continued) —will come around to the office and once in a while wants some money on account, and no doubt whenever he came in Mr. Debolt or Mr. Lewis came in and said, "Mr. Nathan wants a small amount of money" and I would tell them to give it to him, and he went to work and charged these different accounts, and whatever balance was left he either received the check or money for it. The transaction is perfectly straight.

Q. I understand you because Mr. Nathan once in a while wanted money you would give it to him?

A. Yes, sir.

Q. Did you ever know of a man coming around and wanting $221.99 on account.

A. This was the balance; $221.

Q. Why didn't you give him a check?

A. Maybe he needed the money and has no bank account; I can't tell.

Q. Wasn't it because you were changing this account with more money than you actually paid out, and you knew if you gave it in cash you could hide it?

A. I can do nothing of the kind, because our books and records will show it, on the cash book.

Q. Is there anything to prevent your man giving cash to Mr. Nathan and getting back seven-eighths or nine-tenths of it?

A. If Mr. Debolt got that—of course that is different.

Q. (Repeated.) Is there anything to prevent your man giving cash to Mr. Nathan and getting back seven-eighths or nine-tenths of it?

A. There is nothing to prevent it.

Q. You were in the habit of doing that sort of thing with your customers, were you?

A. No, sir.

Q. Didn't you with Fellerman give him $1,125 and make him give back to you $267.

185 A. He did nothing of the kind; he simply paid his commission; he did not; I differ with you; I will not have you go to work and assail my character; the amount is stated on there.

Mr. ELKUS: Don't put your answers with such vehemence; nobody is trying now to assail your character.

A. Well, you insinuated as much as that.

Q. Isn't it a fact that when Mr. Fellerman came there the second time and you took a receipt from him for $1,125 that he, in real-ty, got that sum less $267?

A. Most assuredly; the question simply came in that he owed Mr. Debolt $261; Mr. Debolt had to get a receipt for it to keep his records and books straight; he had to give him eleven hundred and some odd dollars, and Mr. Fellerman would have to pay him that amount of money. Mr. Fellerman had here $267 and $1,125, and he paid back to us $261.62 and $124.78; unless Mr. Debolt had gotten a receipt for $1,125, how could he balance his cash at night?

By the FOURTH JUROR:

Q. Is that on the same day?

A. Yes.

By Mr. ELKUS:

Q. Was there any reason why you could not have given a check to Mr. Fellerman for the net sum which he was to have received?

A. No; Mr. Debolt could not have given me an accounting; he could not show what he had paid out, and what he had gotten in. If he had gone to work and made out a slip less that amount he could not make the proper entries; it would be impossible to do so, because then Mr. Fellerman would still owe us the money, but when he paid the money he must have gotten a certain amount of money to pay the money back.

Q. Do you seriously mean that?

A. Most assuredly I do.

186 Q. Do you mean to say that where you have an account with a man, and he owes you some money and you owe him some money, that you can't strike a balance and give him a check for that sum?

A. Yes, sir, but not keeping the records.

Q. Do you mean to say that if you owe a man $1,100, and he pays you $267, that you can't draw a check for $800 and odd dollars, the difference, and make the proper entry in your books, and show how the transaction occurred, and keep a preferred record of it?

A. Yes, sir, we could, perhaps.

Q. Do you mean to say that that isn't the proper way to do it?

A. No, it is not; I differ with you; we had those books started by an expert accountant, and that is the method of doing it correctly.

Q. Do you mean to say that any expert accountant told you always to pay cash?

A. No.

Q. Isn't a check the best voucher and the best record of a transaction that can be had?

A. Yes.

Q. When were these bills presented to you (Exhibit 11), Mr. Nathan's bills?

A. November 20, 1905.
Q. He was doing all your business at that time?
A. I don't know.
Q. Well, doing a great deal more than the Fellerman case?
A. Yes, sir.
Q. What is on these paper- to show that; it has nothing to do with business?
A. There is nothing to show that Mr. Ralph Nathan was charged with these accounts.
Q. What is there on these papers to show that it has got anything to do with Fellerman?

Mr. GAINSBURG: The papers speak for themselves.
Mr. ELKUS: I accept it.

Q. This statement which you made up, and which you call making up his account, which is Exhibit 11, is a statement first of the name of the person that Fellerman & Son sold, and second gives their address, the next the terms on which the goods were sold, when the account was due, and then the amount of the gross amount, and then the amount less the discount?
A. Yes.
187 —. And then there is a column for Bradstreet rating?
A. Yes, sir.
Q. Almost all those accounts were short time accounts, weren't they?
A. Well, I can't say that; I can look at them and let you know.
Q. Well, you collected most of the money within forty days after he assigned the accounts to you?
A. Yes.
Q. So you had all your money back within forty days?
A. Yes, sir.
Q. And the most of these houses were houses well known to you as being houses of first-class financial standing?
A. Some, yes; not all.
Q. Except Peary Son & Company?
A. Yes; that is so.
Q. Charles A. Stevens?
A. That is another one.
Q. Gimbel Brothers of Philadelphia; they are a first-class house; Sticks, Barr & Fuller of St. Louis?
A. That is a first-class house?
Q. They didn't need to have any lawyer to collect the accounts, did they?
A. No.
Q. Mish, do you know him?
A. I do.
Q. You didn't need any lawyer to collect his account?
A. I refuse to answer.
Q. Why?
A. Well, I don't think it is right for you to read people's names

in court and have me pass upon their credit; I may have some reasons.

The COURT: That is true.

Q. A. Mark's Sons of Amsterdam, New York; don't you want to answer that?

A. No; I won't answer any of them.

Q. Will you tell me why in this account you charged Mr. Fellerman with collecting from Gimbel and Stevens, these first-class houses?

A. Do you wish me to explain?

Q. Yes.

A. We have in every instance found that when a party fails, or goes into bankruptcy, the receiver or the attorneys for the receiver, or some fellow who the accounts have been assigned to, will go
188 to work and write to these different people, always stating to them to remit to them; and we at times would find that it would take us years to get our money either from the receiver or from the attorney of the receiver, or whoever had anything to do with it. So we have established the practice that the moment a man fails, and it is embodied in our contract, that we will at once go to work and send these accounts to an attorney, so that the attorney can write to the client: "My client, The National Discount Company, owns this account, and you must either pay it to them, or to us; otherwise you do it at your peril," and that is the reason we can collect these accounts, and that is done in every instance where such a thing occurs. It was done in this instance because we had no confirmation of these accounts when this man failed; I had given him $4,200 and I had no confirmation of the accounts. I didn't know if it was fake accounts, or how the accounts stood, so I was only too anxious to give it to my attorneys so as to ascertain the status of the accounts.

BENNO LEVISON, JR., resumes the stand:

Cross-examination continued by Mr. ELKUS:

Q. Is this the testimony that you gave when you were examined at your office in 1907? (Producing testimony to witness.)

A. Yes, sir.

Q. I think you said yesterday that that testimony was taken down by a stenographer on March 29th, 1907?

A. I don't remember that I said it was taken down on March 29th, but I know this testimony was taken, because it has my signature to it.

Q. Well, it was taken several days before you signed it?

A. Yes, sir.

Q. It was taken down by a stenographer?

—. I believe so.

Q. At your office?

A. I believe so.

189 Q. Your counsel, Mr. Gainsburg, was present?

A. I believe so.

Q. Don't you remember?
A. Yes, I think he was.
Q. Aren't you sure?
A. He was there; I can't remember positive about these things, because they have been some time ago.
Q. They are not nearly as long ago as the transactions with Fellerman?
A. Yes, sir——

Objected to.

A. (continued)—I have thought of the transactions with Fellerman and I haven't thought of this.
Q. After this was written out by the stenographer who took it, it was sent to you and you read it over?
A. I did, sir.
Q. Consulted with your counsel about it?
A. I did not.
Q. You didn't see him?
A. No, sir.
Q. You made corrections in your own handwriting, as you saw fit?
A. Yes, sir.
Q. You made additions in your own handwriting?
A. Yes .
Q. And signed it?
A. Yes, sir.
Q. And swore to it before a notary public?
A. Yes, sir.
Q. And sent it to the receiver as being a true statement of the facts?
A. Yes.
Q. A full statement of the facts?
A. As I remembered them at that time.
Q. And this is your signature attached to that?
A. Yes.

The testimony is offered in evidence.
It is marked Libellant's Exhibit 14.

Q. All of the corrections in ink were made by yourself in your own handwriting, were they not?
A. Yes, sir.
Q. And the addition at the end of the typewritten matter
190 on the last page after your first signature was volunteered by you, not being in answer to any question; is that so?
A. I didn't write all; I wrote some; "We returned to the receiver collateral accounts $1,528.71;" I wrote that.
Q. Who wrote the other part, "I do not remember," etc.?
A. I can't tell who wrote that.
Q. Isn't it in your handwriting?
A. No, it is not.
Q. You are sure of that?

A. Yes, I guess I ought to know.
Q. I think you ought to know; isn't it in your handwriting?
A. No, sir; it is not; no, it is not.

By Mr. GAINSBURG:

Q. Is that in your handwriting, "I do not remember whether or not," etc.?
A. It is all, except that latter portion—I am entitled to answer all the question, and to have it appear what portion of it is in my handwriting and what is not.

Mr. ELKUS: Well, I withdraw the question I asked you.

By Mr. ELKUS:

Q. Is this part of the statement, "I do not remember whether or not there was anyone with Fellerman at any time that I had the transactions herein mentioned"——
A. That is correct.
Q. One moment. You haven't heard the question. Do you mean that is the fact?
A. At that time, yes; it is a fact.
Q. At what time?
A. At the time when I made this statement.
Q. That was sent by somebody prior to its being sent back to the receiver or trustee; what I have just read?
A. It was—I do not quite understand your question.
Q. The words I have just read to you, which are written in ink at the end of the statement, and underneath your first sig-
191 nature, were written by somebody before you subsequently signed the paper again and re-swore to it?
A. Yes, sir.
Q. And returned it to the trustee; you know they were written by Mr. Gainsburg, don't you?
A. Yes, sir.
Q. Doesn't that refresh your recollection that you and he sat down together at his office, or at yours; took this typewritten paper as it came from the stenographer for the receiver and carefully went over it word for word, sentence for sentence, and you corrected it after consultation with him?
A. Will you allow me to answer your question? I can't say yes or no to that question. I had this paper in my possession two or three days, I think, or some length of time; I received a letter from James Schell & Elkus; I don't know if I have the letter on record or it was asked me over the 'phone if there was anyone present at that time, or if the question was asked to Mr. Gainsburg and he called me on the 'phone and asked if there was anyone present, and I told him at that time that I didn't positively recollect whether this paper was sent to Mr. Gainsburg, he came up and I made the corrections, and he said, "You haven't said, etc., if anyone was present or not," and he wrote this down, and he left, and after he got through with it I began and wrote here, "Returned to Receiver collateral," etc.—and if you will look over your record you will

find that you have either written to me or spoken to Mr. Gainsburg regarding this question.

Q. I never wrote to you in my life. Will you be kind enough to answer a few questions?

A. Yes.

Q. Then, as a matter of fact, Mr. Gainsburg came to you and you and he went over this testimony together?

A. I do not say he came to me; I think he sent it to me.

Q. Didn't you say just now that he came up and wrote it down in my presence?

A. No, I didn't say that; I didn't say he wrote anything down in your presence at all; I did not.

192 Q. And that after he left I wrote the words "We returned to Receiver collateral," etc.?

A. I didn't say anything of the kind; if I did it was a misunderstanding. I don't know if he came or if he sent it to me; I don't know if he came or if he sent it to me; I am not positive about that.

The statement referred to by Mr. Elkus is read to the witness.

Q. You see that you did say that he came up and we made the corrections.

Objected to on the ground that the whole record speaks for itself. Objection overruled.

Mr. GAINSBURG: I except to any colloquy between the counsel cross-examining and the witness.

Q. Do you want to change your testimony?

A. It is just exactly as I stated it.

Q. Then it is exactly correct?

A. It is exactly correct.

Q. Then it is exactly correct as read to you?

A. No, sir, as I explained it.

Q. Then you do want to change it?

A. I want to change it; yes, sir.

Q. Change it any way you like.

A. I have stated already that I don't remember if Mr. Gainsburg came up or if he telephoned to me and sent the papers up to me; I do not remember which it was.

Q. As a matter of fact, can't you say you do remember that Mr. Woerbling was at your office, or in some part of it the second time or the third time that Fellerman came there;

—. I said the young man who was sitting here.

Q. Well, the young man who said his name was Woerbling?

A. The man who said his name was Woerbling, I saw him in the office, sitting outside.

Q. What refreshed your recollection so that you could say that you saw this man sitting in the outside of your office?

A. I saw him sitting here.

193 Q. As soon as you saw him you recollected that you had seen him before, and your memory was good enough to remember that you had seen him with Fellerman on that occasion?

A. Yes, sir; I don't know if he was with Fellerman; I saw him there.

Q. Do you mean to say that you could remember that you saw a man in the corridor of your office three years ago?

A. If I saw his face, yes, sir; if I saw you in my office I would remember you ten years ago.

Q. When Mr. Fellerman first came to you, when he made this proposition to finance the business, you told him that you would have to investigate?

A. Yes, I would think the matter over.

Q. Well, investigate it, didn't you?

A. Well, you may put it that way.

Q. No, I want you to put it that way?

A. I don't think I made a remark to him about investigation.

Q. Didn't you say here in your own language, "It took several days to look up the proposition"?

A. Yes sir.

Q. That is right?

A. That is right.

Q. When you say, "Look up the proposition" you mean to look into whether or not it was advisable for you to enter into the contract which was proposed to you to be made?

A. Yes sir.

Q. You wanted to find out who A. Fellerman & Son were?

A. Yes sir.

Q. What kind and character of business they conducted?

A. Yes, sir.

Q. Whether they had any money or had not?

A. Yes, sir.

Q. What were their assets, and what were their liabilities?

A. Yes, sir.

Q. Whether they were solvent or insolvent?

A. Yes, sir.

Q. Whether the stock they had on hand was a good stock or a new stock or an old stock?

A. Yes, sir.

Q. Whether the concern, in fact, was a going concern or a dead concern?

A. Yes, sir.

194 Q. Whether they were about to fail or about to continue in business?

A. Yes, sir.

Q. Did you do anything to find out these things except to look in Bradstreet's or Dun's, or both, for the rating which those two concerns gave them?

A. Nothing else was necessary.

Q. I haven't asked you that and I move to strike it out.

A. Yes, sir

Mr. ELKUS: I will let the answer stand, "Nothing else was necessary."

Q. Now, will you tell the jury how you found out what their assets and liabilities were, by getting Bradstreet's record—by looking in the books of Bradstreet and finding they were rated $50,000 to $75,000, credit good?

A. I presume that Bradstreet's would not rate a concern $50,000 to $75,000 high, unless they knew something about them, and a reference of $50,000 to $75,000 high was quite sufficient for me to begin to do business with the concern.

Q. Do I understand you then that you ascertained full information upon all the subjects which I outlined in my question, *but* looking at Bradstreet's and getting that information, as you have explained it?

A. That is right, and I beg to add that Mr. Solomon as a stockholder, bringing him up and recommending him highly to me, also.

Q. His words were "They are fine people"?

A. Yes, sir; that they were a going concern.

Q. You didn't get a special report from Bradstreet's or Dun's?

A. I don't think we did.

Q. Have you got one?

A. I don't know without looking it up.

Q. Will you say whether or not you did; yes or no?

A. I can't.

Q. Produce it, please, if you have got it?

A. We will look it up.

Q. Haven't you been searching your records and your memory for every sheet of paper and every scrap of paper and every
195 item of information about this case since it has been brought?

A. Yes, but I haven't looked that up..

Q. Why not?

A. Because I didn't think of it at all; I may not have gotten to that.

Q. And you were asked in that very examination what you did, and to tell in detail what you did?

A. I told you in detail what I did.

Q. Weren't you asked for that at all?

Objected to on the ground that the examination is in evidence and speaks for itself. Objection overruled. Exception.

Q. Weren't you?

A. I presume I was.

Q. Did you ask Mr. Fellerman, "How much do you owe"?

A. No, he told me——

Q. No; did you ask him?

A. No, sir.

Q. Did he tell you?

A. Yes.

Q. How much did he say he owed?

A. He didn't tell me how much he owed; he told me what he was worth.

Q. Didn't you say he told you what he owed?

—. I didn't; he didn't tell me what he owed.
Q. You didn't say that right here now; did you ask him what his assets were?
A. No, sir.
Q. Didn't you ask him what accounts he had on his books?
A. Yes, sir.
Q. What did he say?
A. He said they were all good people.
Q. Did he tell you the amount?
A. No, I don't think he did.
Q. Did he tell you how much was owing to him?
A. No.
Q. Did you ask him?
A. I don't think I did.
Q. Are you sure?
A. I am not sure.
Q. You have recollected so much and your memory has been so much refreshed, see if I can't refresh your recollection more; didn't you ask him, "Mr. Fellerman, how much do owe to your relatives"?
A. I did not, sir.
Q. You are sure of that?
A. Positive.
Q. You couldn't be mistaken?
A. No, sir.
196 Q. Did you ask him how much he owed for confidential debts?
A. No, sir.
Q. Didn't you ask him whether he wanted to pay those first, before he fail?
A. No, sir.
Q. Nothing of that kind?
A. Nothing of that kind, absolutely.
Q. You are clear that you didn't ask him any of these questions about his liabilities or his assets as you have told me; is that right?
A. I did not.
Q. Did the Dun and Bradstreet book which is furnished to you as a subscriber, give Fellerman's condition as of previous January 1st, 1905; didn't it?
A. The book I had was July.
Q. It was the July book?
A. I think so.
Q. Well, that book goes to press when?
A. I presume about June; they can tell you more about it than I can.
Q. Do you think it takes only a month to print that book?
A. I think so.
Q. And you think the statements were as of June 1st, 1905?
A. Not June 1st; they may have been any time in June, or in May.
Q. A very important thing for you to know, if you were going to

manage this business, was to know how much stock they had on hand, wasn't it?

A. No, sir.

Q. You didn't care?

A No, sir

Q. It didn't make any difference to you?

A. It would have if he did a large business with me; and I didn't know if he would ever come again.

Q. But you told him to come back in two or three days, and in the meantime you would investigate the proposal?

A. Yes, sir.

Q. He did come back in two or three days and signed the contract which you gave him?

A. He came back with Mr. Solomon.

Q. And signed the contract?

A. He signed it the following day.

Q. Well, four days afterwards, and you said, "Go away and I will look up this matter"?

A. Yes, sir.

197 Q. And you spent those intervening days in looking up the transaction and in seeing whether from your standpoint it was a proper one?

A. Yes, sir.

Q. Do you mean to stick to your answer that you didn't know whether he would come back, and that was the reason you didn't go up and take stock?

A. I never take stock.

Q. Didn't you say in some cases you did?

A. Take stock?

Q. Yes.

A. No, sir; never.

Q. Do you remember when you were asked here a year and a half ago, and a year and a half nearer the transaction, "Did you ask them (Fellerman) for a statement," and you said, "I don't recall;" do you remember it; just read the one now?

A. Yes, that is the same proposition now.

Q. Do you mean to say to the jury now that you don't remember, after thinking all the details of that conversation over and having your mind refreshed, whether or not you asked Fellerman the important thing, for a statement?

Objected to because the answer read does not refer to Fellerman at all; the preceding question shows that.

The following questions and answers are read to the jury from the record:

Question withdrawn.

Q. Reading from the record:)

"Q. What questions did you ask them? A. I might have asked them whether they were solvent."

Q. You volunteered that, didn't you?

A. I might have asked them that question.

Q. Do you remember whether you did?

A. No, sir, I do not.
Q. That was a very important thing for you to know, wasn't it?
A. Not when a man is rated $50,000 to $75,000.

Q. Don't you know that men are rated at $1,000,000, and
198 they are not solvent?

A. The man hadn't done any business with me, and it is impossible for me after three years to recall every distinct work or every remark that was made; I have these clients coming in twenty a day. How can I recall this was one of these transactions that come every half hour perhaps; I have thought this matter over. I can't recall just every word.

Q. Did you ask him whether he was transferring accounts or selling accounts to anybody but you?
A. I might have asked that question; I don't recall it.
Q. You might have asked him whether the moon was made of green cheese?
A. I might have asked him whether the moon was made of green cheese.

Mr. GAINSBURG: I don't think Mr. Elkus should be permitted to go on in this way.
The COURT: Well, let the witness state what he recollects; his saying that he might have done so isn't really any answer.

Q. Did you ask him whether or not he was transferring all his accounts to you?

A. I don't remember if I put it in that manner at all.
Q. Well, did you put that substance in any form?
A. No, I told him that if he did business with me he should transfer all his accounts.
Q. Why did you say, when you were examined, on page 12:
"Q. Did you ask him whether he was transferring all his accounts to you? A. I don't remember that."
A. Well, that is the same question now.
Q. Now you remember that you did?
A. No, I can't recall it; it is a physical impossibility.
Q. Didn't you say just now that you said, "I expected him to transfer all his accounts to me"?
A. During the conversation; yes, sir.
Q. Didn't you say that?
A. Yes, I did, sir.

Q. Will you be kind enough to say whether you did ask
199 him whether he was transferring all his accounts to you?

A. I don't recall; I can't say it positively.
Q. If your testimony is correct, didn't contract intend that he should give you all his accounts?
A. Yes; and I might have stated so to him.
Q. Didn't you say so?
A. Yes, I might have; but I can't positively swear if I did or not.
Q. If your testimony is correct and accurate, why, when you were asked that vital question, did you say you didn't remember?

A. Because I don't remember; it would have been a question that I would have asked, but I can't say positively that I did.

Q. Did he tell you that he was pressed for payment of his debts by his customers?

A. No, sir.

Q. You are sure of that?

A. As far as I recollect.

Q. Won't you say positively on that vital subject?

A. No, sir; I can't.

Q. Then, he might have said, "I am pressed for my debts, and my creditors have hounded me"?

A. No, sir; he didn't say it, for I would never have taken the accounts if he did, and you know that as well as I.

Q. Didn't you say that just now, that you didn't hear that he was pressed for payment of any debt?

A. No, sir, if he did I would not be here to-day.

Q. Didn't you say just now that you wouldn't say that he had not said to you that he was being pressed for payment of his debts?

A. He did not say that, I am positive.

Q. You are sure of it?

A. Yes, sir; very positive; positive.

Q. You can't be mistaken?

A. Oh, I may be mistaken about anything; but I am positive about that.

Q. Didn't you tell the jury within the last three minutes that you couldn't say whether or not he said to you, "I am being pressed for payment of my debts" in words?

A. He might have said that to me? Nothing of the kind.

200 Q. Didn't you say that?

A. I couldn't remember.

Q. When you were asked at page 12: "Did he tell you that he was being pressed for payment of his debts by his customers?" Are you sure whether or not Mr. Fellerman said to you that he was being pressed for payment of his debts?

A. I am sure he never said that.

Q. And your recollection is clear about that?

A. As clear as it can be.

Q. And at no time could you be mistaken about that?

A. I don't think so.

Q. Then why did you give this answer: "I do not know sir." Answer that.

A. Why, I said "I do not know?"

Q. Yes?

A. I do not know why I said it; my memory might not have been refreshed at that time as it is to-day.

Q. What has refreshed your memory upon that particular subject?

A. Because simply my general routine of business would be that if a man told me he was pressed for money I wouldn't take up his accounts.

Q. Your general routine of business was present in your mind

when you first gave this testimony; it was written out and you read it over carefully either with or without your lawyer, wasn't it?

A. Not as much as it is to day, no sir.

Q. Was there anything besides the general routine of business which caused you to recollect positively that he did not say to you that he was being pressed for debts?

A. My common sense of business teaches me.

Q. Isn't it the fact that after consultation with your lawyer in preparation for this trial he told you, or you found out, that you must say positively that Mr. Fellerman never said anything to you about being pressed for debts?

A. Do you mean after my consultation with Mr. Gainsburg?

Q. I mean my question?

A. I can't answer that question unless you will repeat it; I don't understand that question at all.

201 Q. That is all I have to ask. There wasn't any suit brought against you at the time this testimony was taken and signed?

A. I don't know if there was or not.

Mr. GAINSBURG: It is conceded that there was not.

Q. Now, the next question that you were asked after that, did he tell you that he was being pressed for payment of his debts by his creditors, and you said, "I do not know, sir," "Did you make any inquiry to find out"? and do you remember your answer?

A. I do not.

Q. There is no doubt about it?

A. About what?

Q. That that is the fact that you made no inquiries to find out?

A. I did not, with the exception of the report, the Dun's book.

Q. Dun's book didn't say whether he was being pressed for debts?

A. No, Mr. Solomon coming in there was sufficient, too.

Q. It is an absolute fact that you never made any inquiries to find out whether he was being pressed for his debts?

A. I don't think I did.

Q. Won't you be more positive than that?

A. I don't think I did; I don't think that I did make any inquiries after I had looked at the man's rating.

Q. I am not clear to you; I am limiting my question to one thing; did you make any inquiries as to whether they were being pressed for their debts?

Objected — on the ground that the question has been asked and answered three or four times. "I don't think I can; I don't remember."

A. No, sir; I can't remember.

Q. You are sure about it? I want to know whether you will say you know, or you don't know; now which is it?

A. I don't think I made any further investigations; I don't think I did.

Q. You said when we finished last night—(Mr. Elkus calls for the contract, which is produced to him)—you made an address to the jury, and said you employed Mr. Nathan in every case
202 as soon as there was a failure on the part of your customers?

A. I didn't say that.

Q. But you employed an attorney?

A. Yes, sir.

Q. You employed Mr. Nathan in a great many cases?

A. No, in some cases.

Q. And you employed an attorney whenever your customer failed, and that was specifically provided for in the contract?

A. Yes, sir; that is so.

Q. Show it to me?

A. In this contract?

Q. Yes.

A. That it was specifically provided? I don't know whether it was.

Q. Didn't you say that there was a clause in the contract that specifically gave you the right as soon as your customer failed——

A. I haven't read this thing in this.

Q. Well, if you don't know, all right?

A. Well, I don't know.

Q. You remember telling the jury that, though, don't you?

A. Yes, sir; and I think there is something in there.

Q. You were asked to give us all the correspondence that Mr. Nathan had had with any of these gentlemen or firms that owed the money to Fellerman, didn't you?

A. Yes, sir.

Q. And you replied that there wasn't any?

A. I think there was none.

Mr. GAINSBURG: That has been already asked and answered; I object on the ground that it is taking up time unnecessarily, and going over ground that has already been gone over.

The COURT: Objection overruled. I don't want to restrict your cross-examination, but on the other hand you are taking a good deal of time on it.

Q. You didn't give these matters to Mr. Nathan until after the bankruptcy?

A. No; not till after the bankruptcy.

Q. There wasn't any occasion to?

A. No.

Q. You are positive about that?

A. Yes, sir.

Q. That is one of the receipts?

A. July 25th, yes, sir.

203 Q. Was the bankruptcy before July 25th?

A. No; will you allow me to explain that?

Q. You have answered my question. You produced this receipt to the jury, as being a payment made to an attorney because of the bankruptcy of Fellerman & Son?

A. I didn't say that.
Q. Oh, you didn't?
A. I didn't say that, and I don't wish the jury to infer it, either.
Q. I show you another receipt for $55, and ask you if that is a receipt for Ralph Nathan's services?
A. Yes.
Q. What is the date of that?
A. July 5th; I didn't say "for services."
Q. That is a month and a half before you ever saw Fellerman?
A. Yes, sir.
Q. That is two weeks before you ever heard of Fellerman, isn't it?
A. Certainly.
Q. Will you add up these five receipts for the benefit of the jury and tell them the full amount that you paid Mr. Nathan?

Counsel on both sides make the addition.
Mr. ELKUS: I add it up as $381.99.
Mr. GAINSBURG: $381.99 is the total.
It is conceded that the sum total of these receipts is $381.99.

Q. The amount of these bills which you have produced from Ralph Nathan is $311.99 and $32.78, making a total of $343.78. Do you want to make any explanation?
A. None, sir.
Q. I call your attention to the fact that these bills of Mr. Nathan's are not dated. Do you want to make any explanation?
A. No, sir; our books will show when this account was paid.
Q. These receipts show, don't they?
A. Yes, they show.
Q. Aren't these receipts accurate statements of the facts?
A. Exactly.
Q. Word for word?
A. Word for word.
204 Q. Everything you have is accurate?
A. Very accurate.
Q. When Fellerman came in there on the 15th of August he brought in these accounts with him?
A. Yes, sir.
Q. But he didn't have duplicates of each one?
A. Yes, sir.
Q. And you wanted copies; then he said he wanted $3,000 on these accounts?
A. He did.
Q. That was the first business transaction with you?
A. Yes.
Q. And that was a part and parcel of this entire business transaction which you were to undergo?
A. Yes, sir.
Q. And you had a check drawn to his order?
A. I did.
Q. And he said he wanted the cash, did he?

A. He said it to Mr. De Bold first.
Q. And then to you?
A. Yes, sir.
Q. The reason he gave to you was that he wanted to meet a note in the bank?
A. That is the reason.
Q. And he was afraid that your check would not be taken by the bank?
A. Something to that effect.
Q. Well, that is the substance of it?
A. That is the substance of it.
Q. Why didn't you tell him to get your check certified?
A. I might have stated so to him.
Q. Do you say you did?
A. I don't recollect it, but simply wanted the currency and I said to Mr. De Bold: "You go and get it."
Q. A certified check drawn on the Pacific Bank by the Pacific Bank would be taken in any bank in New York to pay any note?
A. Yes, sir.
Q. Didn't it strike you as a business man of experience that for a man to come in and ask to have a check for $3,000 cashed to deposit the money in a bank to meet a note was a pretty suspicious circumstance?
A. Not at all.
Q. Not at all?
A. Not at all; not at all.
205 Q. Do you know that when any of these kinds of transactions are done they are always done in cash; you know that, don't you?
A. No, sir, I do not; no.
Q. You have never heard that these gentlemen use as a motto that "Cash leaves no trail"?
A. They might use that; I don't know anything about it.
Q. You pay out a great deal of money in cash, don't you?
A. We do; yes, sir.
Q. Have you told the jury everything that you got from Fellerman on that August 15th?
A. As far as I can recall; if you recall any circumstance——
Q. Did you get any guarantee that he would pay you the $3,000, from anybody?
A. You see you are refreshing my memory.
Q. I knew I would refresh it when we got to it.
A. I believe that Mr. Fellerman stated to me that these accounts not being confirmed, "I will give you a guarantee if you are anyway uneasy." I don't know if a guarantee came to us I said, "Very well, we will take as much security as we can;" you bring up a guarantee, and we will take it."
Q. A guarantee of what?
A. Of the money——
Q. A guarantee that somebody, or somebody else, bound himself

to pay the $3,000 in case either Fellerman did not pay it or it was not realized on the accounts?

A: In case it was not realized on the accounts, or Fellerman did not himself pay it.

Q. And that guarantee was signed by whom?

A. I don't remember now.

Q. Well, see if I can't refresh your recollection; wasn't it signed by a man named Schiller?

A. Wasn't it? Well, then, it was signed by a man named Schiller.

Q. Wasn't it signed by a man whose note was in the bank, or whose indorsement was in the bank which your money went to pay?

A. I don't know anything about that.

Objected to. Objection overuled. Exception.

206 Q. Where is the guarantee that you got?

A. I have no idea at all.

Q. Have you looked for it?

A. No, I have not looked for it; and never gave it a thought until this moment.

Q. Did you ask for the guarantee?

A. No, I don't think I did; I think it was given voluntarily.

Q. Do you mean to say that he volunteered to give you the guarantee?

A. He volunteered to give me the guarantee, for the simple reason that I hesitated to give him the $3,000.

Q. What did you have as security; you had Fellerman's agreement to pay, and he was rated at $50,000 to $75,000, you had the assignment of accounts, the face value of which was about $5,300?

A. Yes, sir.

Q. Against any of the houses which you knew to be first-class concerns?

A. Yes, sir.

Q. And besides that you had a guarantee by a man named Schiller that that money would be paid in case the accounts didn't pay it, or Fellerman didn't pay it?

A. Yes, sir.

Q. Did you look in Bradstreet's and Dun's to see how much Schiller was rated?

A. I don't know if I did or not; I might have.

Q. That would be the ordinary routine?

A. Yes, sir.

Q. And if he wasn't rated at a good figure you wouldn't have taken it?

A. Yes, I would have taken it, because I considered the accounts perfectly good.

Q. Did you take the guarantee because you suspected that Fellerman——

A. No, sir, I did not.

Q. Do you know what I am going to ask you?

A. Yes, sir.

Q. What was I going to ask?
A. I don't know.
Q. Didn't you take that guarantee so as to be sure to be on the safe side in case Fellerman failed; isn't that right?
A. No, sir; I don't know if I did that; he failed and I simply took all I could get; that is all.
207 Q. Wouldn't that be your ordinary routine.
A. No, sir.
Q. In case you lose this suit you can call on Schiller to pay, can't you?

Objected to as immaterial, irrelevant and incompetent and calling for a conclusion, and also for the construction of a written instrument which is not in evidence. Objection overruled. Exception.

A. I haven't given this matter a thought; I don't know anything about it.
Q. When did you last see that document?
A. I guess when he gave it to me.
Q. Don't you keep all these papers in your very well regulated office, in one file?
A. Yes; I wish to state right here——
Mr. GAINSBURG: Just answer the question.
Q. Make any explanation you want?
A. No; I will not explain.
Q. You mean you won't explain because I am asking you to?
A. No.
Q. Who drew the guarantee?
A. I don't know.
Q. Was it a printed form that you gave to Mr. Fellerman to have signed.
A. I don't know.
Q. Have you got such printed forms?
A. No, sir.
Q. Have you got any form of that kind in your office that has been prepared for you by counsel?
A. I don't think so.
Q. Don't you know whether you have such a printed form?
A. I don't think so; I don't know; I might have had a paper there.
Q. Was that guarantee drawn by a lawyer?
A. I don't know; I haven't even refreshed my memory; the first thing that refreshes my memory is when you speak about it.
Q. Did you ever tell Mr. Gainsburg about that guarantee?
A. No, sir, I did not.
208 Q. Did you ever ask the receiver whether he made any claim to these accounts which have been assigned to you?
A. I don't remember; the correspondence would prove that.
Q. Did he ever make any claim on you.
A. I don't know that, either; the correspondence will show that.
Q. Just one thing; the Schiller who signed that guarantee was named Eugene H. Schiller?

A. I don't know if his name was Eugene or any other name.

Q. Did you ask Mr. Fellerman, when he came to see you, with what banks he did business?

A. I don't think I did.

Q. Will you say you did, or did not?

A. I can't recall it.

Q. One of the ways of finding out whether a man has any credit, or not as good, is to go to his bank and ask them, isn't it?

A. Yes, sir.

Q. That is a very good way, too, isn't it?

A. Yes, sir.

Q. When these moneys were paid, that you say Mr. Nathan was retained to collect, were they paid direct to you by the different persons who owed them?

A. Some of them were paid perhaps direct by the parties that owed them to us.

Q. Was any money ever paid to Mr. Nathan.

A. That I can't tell.

Q. Any correspondence would be between Mr. Nathan and them, and not between you and these various persons?

A. Well, they might be between the various persons and us, and there might be between them.

Q. I show you a letter and ask you if you received that letter from Boettscher & Lillard Company; did you get that letter?

A. I don't know if we received that or not; it is addressed to us and it must have come to us.

The letter is offered in evidence.

209 Mr. GAINSBURG: There is no objection other than that it doesn't appear on the record that there was no charge made for collecting that account.

Mr. ELKUS: The purpose is to show that the sending — these accounts to Nathan was a mere pretense.

Mr. GAINSBURG: But there is no charge made for it, and there is no proof that that account was sent to Mr. Nathan; there is a bill here in evidence which states the exact accounts that were sent to him.

Mr. ELKUS: The testimony is that he turned over every account to Nathan.

Objection overruled. Exception.

The letter is marked Libellant's Exhibit 15.

Q. Did you receive the letter I now show you of W. B. Stevens & Company?

A. I don't know if I got it or not; it is written down National Discount Company.

Q. It is addressed to you?

A. Yes, sir; it is addressed to us.

Q. Did you get this one also (producing letter to witness)?

A. The only thing is that we have a stamp, and wherever we receive a letter of that kind that we stamp, "Received," and so on.

Mr. GAINSBURG: We will concede it; there is no objection.
The letters are offered in evidence.
They are marked Libellant's Exhibits 16 and 17.

Q. Where is this corridor in your office that you remember seeing Mr. Woerbling in; is that right outside your private office.
A. Yes, sir.
Q. Was there a bench there right by the door of your private room?
A. Yes, sir.
Q. And Mr. Woerbling was sitting on that bench?
A. I don't know; I know I saw his face; he may have been sitting inside of my office.
Q. You say now he may have been inside your private room?
A. Well, I don't know; I can't recollect; but my impres-
210 sion is that he was outside, sitting there; I don't know if I saw him one place or another.
Q. Will you say that he was not seated in your private room when Fellerman was there?
A. I will not say that; I don't know that; I don't know that. The office is very large, and he might have been sitting on one side in the office.

Redirect examination by Mr. GAINSBURG:

Q. This bill you said there is no date; upon this bill which was rendered to you by Mr. Ralph Nathan there is a charge of $311.99, and in addition to that there are two charges for two other matters, aggregating $70, making a total of $381.90; is that correct?
A. That is correct.
Q. There is an item underneath, "Received on account $160; balance due, $221.99"; did Mr. Nathan have a running account with you?
A. Yes.
Q. Did you give money to him from time to time.
A. We did.
Q. Will you explain then what this statement on his bill means, "Received on account, $160"?
A. Yes, sir. (Witness refers to slip.) *A.* He got different amounts at any time that he came in; for instance, he came in one day——
The COURT: Never mind about the details.
Q. State just generally?
A. From time to time small amounts; at one time he got $45, at one time $55, at one time $40, at another time $20.
Q. Show me the receipts that aggregated this sum of $160?
A. Here it is (producing it).
Q. Dated July 25, 8/29, September, 1905; and this check or this cash receipt, dated on the 20th day of November, 1905, for $221.99, that was the balance due him on this bill rendered to you?
A. Yes, sir.
Q. He is a relative of yours, isn't he?
A. A distant relative, yes.

Q. And from time to time when he came in for some money you would give him cash and keep these slips?

A. Yes, sir.

211 Q. Is there any other explanation you wish to offer as to why these slips are dated before the failure of Mr. Fellerman.

A. None other, with the exception that he got the money before.

Q. And that $160 you got credit on the bill he rendered you for $381.99?

A. Correct.

Q. That is how; Mr. Elkus asked you how it came that he received that sum; does that explain how he received that balance of $221.99?

A. Yes, sir.

Q. The accounts that you turned over to Mr. Nathan are for collections; were those accounts due, or past due, or had they not as yet become due?

A. They had not as yet become due, of course; they were long past due.

Q. At the time you passed them over to Mr. Nathan?

A. Some of them were past due.

Q. And some of them were due?

A. Some of them were due, and some of them were past due.

Q. And some of them were not due?

A. Some of them were not due.

Q. And some of the accounts which he did not collect, do I understand he returned them to you.

A. Yes, he returned them to me.

Q. And thereafter all correspondence with reference to those accounts was had direct with your office?

A. Yes, sir.

Q. And were those accounts returned to you when you settled this bill of Mr. Nathan's?

A. Yes, sir.

Q. And it was the same day that you gave him the balance of the cash due him?

A. Yes, sir.

Q. So that all correspondence with the unpaid accounts of A. Fellerman was thereafter had with you?

A. Yes, sir.

Q. You stated upon your direct-examination that the reason you turned over these accounts to your attorney was because you had found in your experience on the eve of bankruptcy on the part of your customer that the receiver and the trustee makes claim thereon.

Objected to as irrelevant and incompetent.

212 The COURT: That is preliminary; go on and finish your question.

Q. Did you thereafter and from time to time receive letters from various customers referring to this bankruptcy proceeding; and I show you this letter from S. & H. Garment Store.

The letter read to the jury.

Q. Did you receive any other similar correspondence?
A. Yes.
Q. And did you send any of those letters to the receiver asking him to communicate with a number of other concerns?
A. I presume the secretary did.
Q. You turned that over to Mr. Lewis.
A. Yes, sir.
Q. In the course of Mr. Elkus's cross-examination there was a question that I do not recall at present put to you by him, and in which you stated you wanted to make some explanation; do you recall that?
A. No.
Q. You stated that in addition to receiving the accounts and the agreement signed on this 15th of August that you also received some guarantee; now what explanation or statement, if any, do you wish to make with reference to that?
A. Well, I will tell you the fact of the case; as you know, I haven't even spoken to you about it, and never thought about the matter until Mr. Elkus brought it up, but I believe that I stated at the time to Mr. Fellerman, "We do not care to take accounts from any client unless we get them verified; you want $3,000, and it is against our usual custom of doing it that way; I am willing to accommodate you on account of the high standing and recommendation of Mr. Solomon"; and he turned around and said, "If you desire any guarantee I am going to bring you around a guarantee," or something of that kind; I don't recall if a guarantee came, but if it came we just took it and nothing further was said about it.

Q. As a matter of fact you have no printed form of guar-
213 antee?

A. No, sir, we have none; this I don't think we have.
Q. And after you made this advance you received a number of confirmations of these accounts?
A. Yes, sir.

Recross-examination by Mr. ELKUS:

Q. I am going to try and refresh your recollection a little more; isn't it a fact that Mr. Solomon brought Mr. Schiller to your office?
A. No, sir.
Q. You are sure of that?
A. I am quite satisfied.
Q. Doesn't it refresh your recollection——
A. No, sir.
Q. Won't you wait till I get through? Isn't it a fact that Solomon said to you, "There may be some trouble about this account, but I will get Schiller to guarantee it"?
A. I have stated to you a half a dozen times——
Q. Won't you say whether it is so or not?
A. No, sir; it is not.
Q. Absolutely?
A. Absolutely.
Q. And there can't be any question about it?
A. No.

Q. Didn't Solomon have something to do with Schiller coming there?

A. Solomon?

Q. Yes, Solomon?

A. I never spoke one word to Solomon about Schiller.

Q. That isn't an answer to my question.

A. I don't know; I don't know what these two people had——

Q. So it may be that Mr. Solomon brought Mr. Schiller there?

A. He didn't bring him there.

Q. Or meet him there?

A. He didn't meet him there.

Q. Or send him there?

A. That I don't know; but he didn't meet him there.

Q. You turned over all these accounts to Nathan immediately upon the failure; you heard of the failure on Monday, the 21st of August?

A. Yes, sir.

214 Q. Were any of those accounts that you loaned money on on the previous 15th past due by that time?

A. The records will show; I don't recollect it now.

Q. You were able to tell your own counsel that they were long past due?

A. Because I looked up the records and saw that they were past due.

Q. How many were past due?

A. I can tell you by the slip.

Q. Can you tell by this (indicating witness' accounts) whether any of them were past due on August 18th or 21st?

A. Here I find one small account that was due July 26th, $57.

Q. That was due before you got it, then?

A. Yes, sir.

Q. And here is another one of $29; when was that due?

A. That was due June 27th.

Q. That was due before you got it, too?

A. Yes sir, that was due before I got it too; and here is another one—well, I can't tell if they were past due or not, because I can very near tell from the statement that Mr. Fellerman gave on his statement; yet while he might have marked down ten days when he actually sold the goods on sixty days and the people would write and state to——

Q. I want to know what accounts were past due?

A. Well, there are some.

Q. That became past due between the 15th and 21st of August?

A. Won't you have my bookkeeper do that?

Q. No, I want you to do it; you testified that there were a number of them that were past due in the latter part of August and October?

A. Well, August and October are six weeks apart.

Q. Well, have you answered my question as far as you can?

A. I have answered your question as best I can.

Q. Will you tell me how you could tell when you paid Mr. Nathan

money on July 25, $40, it was going to be charged to Fellerman?

215 A. It was not going to be charged; he owed that amount of money on the books; there was an indebtedness of $106 to us, if you want to know.

Q. Didn't you have other business that he was doing for you at that time?

A. Not at that time.

Q. How do you know?

A. Because I know, that is all.

Q. Is this the account that you show me (referring to ledger) on page 114?

A. Yes, sir.

Q. Is that the only account in your book?

A. That is all.

Q. When does that account begin?

A. That account begins on October 11th.

Q. What year?

A. 1905.

Q. That is four months after these transactions took place, isn't it; July or June?

A. No.

Q. Well, three months?

A. No; August.

Q. Well, two months?

A. Yes, sir.

Q. You are not trying to deceive this jury, or producing this as a——

A. No, sir.

Q. Won't you wait till I get through? Have you got any other account with Ralph Nathan other than this one you produce?

A. No, sir.

The account is offered in evidence.

Mr. GAINSBURG: There is no objection.

It is marked Exhibit P.

Q. Make any explanation you want of page 114 in your own ledger.

A. These amounts—Mr. De Bold was our secretary before—these amounts our secretary had given to Ralph Nathan. Mr. De Bold left us, I think it was sometime in the month of September, the latter part of September; he carried those slips that you see here, they were an actual indebtedness of Ralph Nathan to us. Mr. De Bold leaving us and turning over the account to the future secretary we found therein these slips — cash amounts given to Ralph Nathan.

I then turned it over to the bookkeeper, Mr. Phelps, and said,

216 "You must not keep any further cash slips of this nature. You must enter them in the books." And he entered the indebtedness of October — of $160 on the books and that is where the account starts. Any other business that Mr. Nathan had with us we simply went to work and paid him if it was a trifling matter.

He was a distant relative of mine and whenever he needed a little money he came and got it. And he was indebted to me at that time, when I turned over this matter to him. That is all the facts of the case; that was where the $160 came in.

By Mr. GAINSBURG:

Q. When did Mr. De Bold leave your employ?
A. I think in September, 1905.
Q. Wasn't it 1906?
A. No, 1905; I think it was in 1905; the records will show.

By the SIXTH JUROR:

Q. In your direct-examination you said that you would do all his business and take care of his books and office work and collect his bills at five per cent.; you didn't include that, or you didn't intend to include in that, the counsel's fees in case the debts were uncollectible, and did you so inform him? I see on the cross-examination that you charged attorneys' fees for doing that work. Which do you mean?

A. Well, I meant five per cent. for all work. When I took the client I didn't think that they would have any counsel's fee in the matter, or that there would be anything where a counsel would need to be employed; I simply told him that I would charge him five per cent. for doing his financing for him. That I would look after his accounts, collect them and do whatever office work was to be done; there was never a question of — counsel that came in.

217 Q. You really meant only just the good accounts; not the bad ones?

A. No, all of them.

Q. Then still you come in and charge for the attorneys' fees. How do you explain that?

A. Our contract distinctly states in there that when a man fails the attorneys' fees should be borne by the customer.

By Mr. GAINSBURG:

(Reading from contract.) The customer authorizes and empowers the banker to endorse the name of the

"customer on any and all checks, vouchers, notes, drafts or other negotiable instruments or commercial paper which may be payable to the order of the Customer, or endorsed over to the order of the Customer, and received as remittance for account assigned and transferred to the Banker as aforesaid; to collect and receive all moneys, to give receipts therefor, and to sue for and collect said accounts in its own name, or in the name of the Customer, or otherwise, it being distinctly understood that all and every expense incurred in the collection of accounts is to be charged to and paid by the Customer."

That is that paragraph with reference to the charges of the expense of collection; then the sixth paragraph says:

"The Customer agrees to pay to the Banker in cash or allow the Banker, if it so elects, to retain from any moneys collected or received upon the accounts of the Customer, a commission of five per centum

on the gross amount of accounts of the Customer to reimburse the Banker for services rendered or to be rendered in the collection of the accounts in assisting in extending credit, securing
218 references and reports, and generally to assist the Customer with his credit department. The Customer also agrees to reimburse the Banker for such outlays as exchange on checks and postage."

By Mr. ELKUS:

Q. Did Mr. Nathan do anything in the Fellerman matter, except borrow money from you?

Objected to because there is no evidence that he borrowed money in the Fellerman matter; the evidence is that the money was borrowed before and was charged to his account and deducted from his bills in the Fellerman matter.

Objection sustained.

Q. What did he do in the Fellerman matter that you know of your own knowledge?

A. I don't know.

Q. Couldn't you just as well have charged these accounts to any account that you had in the office?

A. I could have charged it to any business that he had with me.

Q. Your counsel has read two clauses to which you have referred, and in which you state that it "distinctly authorizes you to charge attorneys' fees for collection;" is there any such language in the contract that was signed?

Mr. GAINSBURG: I have read that; of course there isn't any for attorneys' fees.

Q. Will you tell the jury why when you gave the receipt of that contract you gave him the one with "attorneys' fees" printed in?

A. About six months after the contract with Fellerman was printed Mr. Gainsburg either came to the office—I am not sure—but he said that this contract was not followed up after the way he drew
219 it up; we sent a number of those to the printer, and the printer instead of printing the whole thing over again, went to work and inserted this, "with attorneys' fees," and when I got them back I put them on top of the old ones, and when James Schell & Elkus asked me for a copy of course I had nothing to hide—I simply took out the first one and gave him that, which has "with attorneys' fees." I looked up the matter and I will show you just exactly those, and I keep everything very accurate. In printing on the agreement, "sixty cents, May 10th, 1906." That is the way this happened, and that was the bill for the additional printing in that form there.

Mr. ELKUS: I concede that it was put in afterwards, and paid for; I had no doubt about that.

The COURT: You don't claim that this gentleman had this put in afterwards?

Mr. ELKUS: No.

Mr. GAINSBURG: Then why was it brought out?

Q. What were you to do in collecting the accounts for five per cent.?

A. I was to get references, I was to——

Q. I mean about collecting, for which you were to get five per cent.?

A. I was to collect the accounts.

Q. Do you mean to write a letter?

A. Yes, to write letters to the people and send them statements.

Q. This paragraph 5 says:

"It being distinctly understood that all and every expense incurred in the collection of accounts is to be charged to and paid by the customer."

What I want to know is under that you could charge him for postage?

A. We do.

220 Q. Under that you could charge him for writing the letter?

A. No, we don't.

Objected to as to the postage because there is a specific provision in the contract for postage; these accounts were become past due, and therefore there was another reason for giving the accounts over to Mr. Nathan.

Mr. ELKUS: We should like to call Mr. Fellerman out of order, because he wants to go away.

ABRAHAM FELLERMAN recalled.

By Mr. ELKUS:

Q. You were asked when you were here before, whether you could read and write, and you said you could not?

A. Yes.

Q. Can you write your name?

A. Yes, sir.

Q. And your firm name that you did business under?

A. Yes.

Q. Can you write anything else?

A. No, sir.

Q. Is Mr. Eugene H. Schiller a relative of yours?

A. Yes, sir; my son-in-law.

Q. Did you know anything about his having guaranteed your accounts or account with the National Discount Company?

A. I only heard it a few days ago; I didn't know it at that time.

Q. Do you know by whom that was arranged?

A. I don't know; I can't answer.

Cross-examined by Mr. GAINSBURG:

Q. You didn't know that a certain person mortgaged your accounts?

A. I did not.

Q. You didn't know anything at all about it until a few days ago?
A. No, sir.

The COURT: That is the third time he said so; you don't gain anything by asking questions over and over again.

221 Q. Did Mr. Levison ask you for a guarantee?
A. I don't remember that.
Q. Did you offer a guarantee to him?
A. No; I gave him so much money and it was always good; every one of them.
Q. Did you offer him a guarantee?
A. No, sir; I didn't offer him a guarantee; I don't remember.
Q. Did you mention Schiller's name to him?
A. I don't remember.
Q. You are on jury duty?
A. Yes, sir.

EVARTS P. BECK, being duly sworn and examined as a witness for the defendant, testifies as follows:

By Mr. GAINSBURG:

Q. You are connected with Bradstreet's agency?
A. Yes, sir.
Q. And you were subpœnaed to appear here and produce the records of the financial conditions of the various firms in the City of New York?
A. Yes, sir.
Q. Have you produced with you a book containing the names of Fellerman and Son, showing their rating in Bradstreet since August, 1905?
A. Yes, sir.

Mr. ELKUS: I will concede that the rating in Bradstreet was under the book issued in July, 1905, that is, rated in Bradstreet as "Q. D.," which means from $50,000 to $75,000, credit third grade.

Cross-examination by Mr. ELKUS:

Q. In addition to the book you published, you have in your office statement in detail showing the assets and liabilities of every one of those persons whom you rate?
A. Yes, sir.
Q. And as often as you can you get signed statements showing those facts?
A. Yes, sir.
222 Q. And any customer of yours can get those on application?
A. Not the statement, no, sir.
Q. I mean a copy of it?
A. Yes, sir.
Q. And they can look at the original if they want to, can't they?
A. I don't know that.
Q. You keep a record in your office, do you not, of every time a

copy of the statement is sent out to a customer of each particular man or firm or corporation?

A. Each time one reports, yes, sir.

Q. Take this book of July, 1905; can you tell me as of what date the statements are made of the different persons; take Fellerman and Son; it states their credit is so and so; do you know as of what date that is made up?

A. Not from my books, no, sir.

Q. You could find out, couldn't you?

A. Yes, sir.

Q. When first was this book that came out in July sent to press?

A. Usually the latter part of June, I suppose.

Q. Do you mean to say that it is printed in one day?

A. No, but the book closes; the copy goes to press about two weeks before the book comes out, I believe.

Q. And you spend about how long getting up that book?

A. Well, as soon as one copy is printed we begin to get the next one ready.

Q. And write all the people for a statement?

A. Yes, sir.

Q. And they make their statement as of their last inventory?

A. Yes, sir.

Q. And most inventories are taken either on July 1st or January 1st?

A. Yes, sir.

Redirect examination by Mr. GAINSBURG:

Q. You brought with you the original statement of A. Fellerman & Son as it is rated in Bradstreet?

A. Yes, sir.

The statement is produced to Mr. Gainsburg.

It is offered in evidence.

223 Mr. ELKUS: I object on the ground that Mr. Levison wouldn't testify that he had seen or obtained this statement, or relied upon it.

The COURT: They show the basis upon which they made the rating in the book.

Mr. GAINSBURG: That is the only purpose for which it is offered. Objection withdrawn.

Mr GAINSBURG: With the consent of counsel, will the substitution of copies be satisfactory.

By Mr. ELKUS: Yes.

The paper above referred to is marked Defendant's Exhibit Q.

Mr. GAINSBURG: The statement shows:

Merchandise actual value	$32,363.24
Notes & Accounts Receivable Actual Value	45,764.28
Cash on Hand & in Banks	10,621.53
Machinery Actual Value, fixtures, actual value	5,000.00
Liabilities on open account for merchandise	$9,245.25
Amount to balance showing net wealth	$84,503.80

(Signed) ABRAHAM FELLERMAN.
ISADOR J. FELLERMAN.

Dated, January 28, 1905."

and the following at the head of the statement:

"The following is a statement of our financial condition as it appeared on the 20th of January, 1905, same being based on inventory."

224 The letter accompanying this statement is dated January 28, 1905, and is read to the jury.

ROBERT J. CARNDUFF, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. GAINSBURG:

Q. You were subpœnaed to appear here from Dun's Agency?
A. Yes, sir.
Q. Did Fellerman & Company have a rating with your concern in August, 1905?
A. Yes, sir.
Q. Have you looked at the books to refresh your memory?
A. Yes, sir.
Q. What was their rating at that time?
A. "D. plus Q."
Q. What does that mean?
A. $50,000 to $75,000.
Q. What was their credit?
A. "Good."
Q. What was that rating based upon by your Agency?
A. On the statement they made in January, 1905.
Q. Have you got that statement with you?
A. I have, and a copy with it.

The counsel offers in evidence the copy.
It is marked Defendant's Exhibit R.

Mr. GAINSBURG: It is identical except that at the bottom there are, after stating their surplus to be $84,503.80 they give the amount of insurance they have on stock, $35,000 insurance, and they state their annual business as amounting to $256,743.75; and that their annual rent was $3,500, and that their banks are the Oriental and the Union Exchange Banks; the names of the banks are written in ink. The liabilities are $9,245.25; they state that Fellerman had cash in banks $7,374.80. The cash on hand is $3,246.73.

225 Q. In addition to receiving this signed statement from Fellerman on January 26th, 1905, what other investigation did your Agency make?

Objected to as incompetent, irrelevant and immaterial.

Q. If you know; with reference to the financial condition?
A. I made none.
Q. Do you know what is done?
A. I presume——

Counsel for plaintiff objects to any assumption.

Q. What do you know about it?
A. I know nothing.
Q. Have you the Inspectors' report with you?
A. I have.
Q. What is that report?

The Inspectors' report is objected to.
The report is produced.
Mr. GAINSBURG: I should like to know when it was made.

Q. That report is taken from the original files?
A. Yes, sir.
Q. Does that bear the signature of the customer?

Objected to.

Q. When was the last report made to the agency before this book was published, or before it went to press?

Objected to as immaterial.
The COURT: He may state.

A. June 14, 1905.
Q. That contained the personal investigation made by this Inspector?
A. Yes.

It is offered in evidence.
Mr. ELKUS: I object to the witness stating the contents.
The COURT: I don't see any use in it. This is trying the
226 cases to death, but I suppose you are entitled to this.
Exception.
Mr. ELKUS: Do you claim that Mr. Levison saw this?
Mr. FULLER: No, we simply produce it to show the basis on which the rating was made; that is all.
The report is marked Defendant's Exhibit S.
Mr. GAINSBURG: It is substantially a repetition of the statement that I read to the jury.
The COURT: During the recess let somebody make a copy.

Cross-examined by Mr. ELKUS:

Q. Upon inquiry by any of your customers, they would have received a copy of this?
A. Yes, sir.

Met pursuant to adjournment at 2 p. m. as before.

EDWIN J. DEBOLD, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. GAINSBURG:

Q. Where are you employed?
A. William Demuth & Company.
Q. And before that?
A. I was out of town for about six months after I left the National Discount Company.
Q. You were with them?
A. Yes, I was with them.
Q. In what capacity?
A. Secretary of the company.
Q. When did your connection with that company end, about?
A. About the 9th or 10th of September, 1905.
227 Q. You were connected in what capacity with the company?
A. Secretary.
Q. As such did you have charge of the books of the company?
A. Yes, sir.
Q. Up to the date of your severance of your connection with the company?
A. Yes, sir.
Q. Were you in the place of business of the National Discount Company on the 15th of August, 1905?
A. Yes, sir.
Q. You were present in Court yesterday and saw Mr. Fellerman on the stand.
A. Yes, sir.
Q. Did you recognize him?
A. Yes, sir.
Q. Where did you see him before?
A. At our office; at the office of the National Discount Company.
Q. Can you recall the date when you first saw him at your office?
A. Not from my own recollection, but from the date that appears in the books, and upon the records, I can fix that as the day on which he was there.
Q. The first time that you saw him there was when the contract was signed?
A. Yes, sir.
Q. August 15th?
A. Yes, sir.
Q. Tell us what occurred on that day with reference to the Fellerman transaction, as far as you know?
A. Mr. Levison called me into his office and stated that this was Mr. Fellerman, of A. Fellerman & Son, and that we were about to take on the accounts, and asked me to make out a check for the sum of $3,000.

Q. Was there anyone there with Mr. Fellerman at that time.
A. No, sir.
Q. Did you see whether or not the contract was signed?
A. I believe it was; yes, sir.
Q. Were you handed this contract to make certain entries therein?
A. Yes, I was handed a contract to fill out the blank spaces, as was customary.
Q. You were handed this particular contract?
A. Yes.
228 Q. Do you know where Mr. Levison took this contract from? From his drawer or from his desk?
A. My best recollection is that it was lying on the desk.
Q. What did Mr. Levison say to you when he handed you the contract?
A. He said, "We will take Mr. Fellerman's accounts and advance him 75 per cent., and charge him five per cent. commission."
Q. Was that said in the presence of Mr. Fellerman.
A. Yes.
Q. How far away was Mr. Fellerman from you and Mr. Levison at the time this conversation took place?
A. We were both right at his desk.
Q. And did you make the entries in this contract?
A. Yes, sir, I made them.
Q. At the 15th of August, 1905, A. Fellerman & Son, and the writing "75" and the figure "5" are all these in your handwriting?
A. All of them.
Q. Did Mr. Fellerman then sign the contract?
A. Yes, sir.
Q. After the contract was signed what else occurred with reference to the accounts?
A. I took the accounts in the general office.
Q. Who handed them to you?
A. Mr. Levison; I took the statement of accounts into the general office.
Q. Was there more than one.
A. There was more than one; there was a batch of them.
Q. What did you do with them there?
A. Took them into the office and handed them over to Mr. Lewis, with instructions as to what to do with them.
Q. What were those instructions?
A. Those instructions were to get verification of the accounts; that is, to send out the notices, and to call on Fellerman & Son, and arrange their books properly.
Q. In what manner?
A. So far as to show the assignment of the accounts.
229 Q. And the notices you say were to be sent out, they were to be sent out on the regular printed form that you had there, with a reply——
A. Yes, sir, a reply attached thereto.
Q. Did Mr. Fellerman go with you when you left Mr. Levison's office, or did he remain?

A. I believe he went into my office, which was adjacent.

Q. Did you then draw a check for $3,000?

A. Yes, sir, at the time I brought in the statement, I, at the same time, drew the check.

Q. At the time you signed the check was Mr. Levison present?

A. It was done in his office; after that I tendered the check to Mr. Fellerman, and he asked me for the cash, and I said that I didn't think we had that amount of cash on hand, and we would have to see Mr. Levison about getting the cash.

Q. Did you then take him into Mr. Levison's room?

A. Yes.

Q. State the conversation that occurred then?

A. I stated to Mr. Levison that Mr. Fellerman wanted the cash and that I didn't have the cash there on hand, and asked him what he wished me to do in the matter; and upon discussion it was finally decided that I was to take Mr. Fellerman to the Pacific Bank, upon which bank the check was drawn, and identify him and procure for him the check.

Q. Did Mr. Fellerman go with you?

A. Mr. Fellerman went with me.

Q. He testified that he remained in the office, and you went to the bank and brought the money back to him, to the office; is that so?

A. No, sir.

Q. Where did you give him the money?

A. In the Pacific Bank.

Q. You say, "after some discussion;" state what that discussion was, to the best of your recollection?

A. It was about the depositing of the check; Mr. Fellerman stating to the effect that he couldn't use the check on account of having a note falling due on that day, and which he was obliged to have the cash to take it up, as it was then noon time and it took twenty-four hours to go through the clearing house.

230

Q. What did Mr. Levison say?

A. He then instructed me to go to the Pacific Bank with Mr. Fellerman and get the cash for him.

Q. What did you do with the accounts after that.

A. As I said, I gave them to Mr. Lewis to be put through the regular routine of being verified.

Q. Do you know whether or not notice was sent out to these debtors?

A. Yes, they were sent out.

Q. And the entry of that appears in the book under date of August 15th, does it?

A. Yes, sir, that is the entry (referring to the book).

Q. When did you again see Mr. Fellerman?

A. I believe it was on the 18th.

Q. Were you sent for; did you come to Mr. Levison's office?

A. I was sent for by Mr. Levison.

Q. Who was in the office?

A. Mr. Fellerman.

Q. Was Mr. Levison there?

A. Yes, sir.
Q. Do you recall whether there was anyone else there at that time?
A. I don't recall anybody else being present.
Q. You were in Court the day before yesterday, and didn't you see the young man, Mr. Woerbling; he said he was present at the interview at that time; do you remember whether he was there?
A. I don't remember ever having seen him there, no, sir.
Q. What occurred then?
A. Mr. Fellerman brought in some more accounts to discount.
Q. Did he have the accounts with him?
A. He had statements of the accounts with him, yes, sir.
Q. What occurred then?
A. Mr. Levison instructed me to make up the previous batch of accounts and also these.
Q. Tell us what you mean?
231 A. Making a list of them; adding the gross amount and taking off the discount, and arriving at the outside amount of the accounts assigned and making the advances thereon.
Q. And putting them upon this schedule which has been marked in evidence?
A. A schedule; yes, sir.
Q. Was anything else said to you about looking up the accounts.
A. I looked up the ratings and all the accounts.
Q. What was said to you by Mr. Levison with reference to that?
A. I was told to look up the ratings on the accounts and to assort them in some manner; I don't quite recollect how, but I was to look up the ratings at any rate.
Q. Was there anything said to you about assortment for advance purposes?
A. Yes, sir; they were made into two separate batches, or two separate schedules.
Q. That is, those rated and those not rated?
A. Well, I presume——
Q. Don't presume; state?
A. I don't recollect that.
Q. I show you these statements, and ask you to state whether that refreshes your recollection as to what was done with reference to making up these two batches of accounts?
A. It refreshes my recollection to this extent; that these are the slips that were made out at the time, and it appears thereon—a certain amount of them were advanced upon to the extent of 50 per cent., and the balance for 75 per cent.
Q. Are these in your handwriting?
A. Part of the figures are.
Q. Made by you at the time.
A. Yes.
Q. Which part?
A. The lower portion of these figures.
Q. And who wrote the other figures?
A. Mr. Lewis.

232 Q. And were these figures made on these slips on the 18th, when they purport to have been made?
A. Yes, sir.

The statement is offered in evidence and marked Defendant's Exhibit T.

Q. And were those papers handed to Mr. Fellerman, do you know?
A. Yes, sir; they were.
Q. My attention has been called to the fact to ask you whether you delivered copies of these statements to Mr. Fellerman at that time; do you recall that?
A. I don't recall the delivery specifically, but that is the custom that was invariably followed.

Counsel objects to the custom.
The COURT: it may be stricken out.

Q. Do you remember?
A. No, I do not.
Q. Did you at that time figure the commission, the amount of commission due the National Discount Company.
A. Yes, sir.
Q. And upon what basis?
A. On the basis of the contract; five per cent.
Q. On the gross amount?
A. On the gross amount.
Q. What did you figure the *interest* to amount to (handing witness paper)?
A. (Referring to paper) $386.40.
Q. Will you explain the transaction that occurred on the 18th of August, with reference to this commission, $1,006.11 that was paid to Mr. Fellerman at that time?
A. As appears on the memorandum, the gross amount of the advance was $4,100 and a quarter dollars, he having received $3,000 on account by check, and the balance of $1,025 was paid to him, less the commission.
Q. What, if anything, was there said about the confirmation of the accounts at that time; that is, with reference to the pay-
233 ment of the balance of 75 per cent.; if it was said in your presence?
A. I don't recall having heard anything about that.
Q. The claim you say amounted to three hundred and some odd dollars; why was that paid to the firm on that date. Was it first turned over to Mr. Fellerman; the cash, and then he handed the cash back to you, in which form was it done?
A. He was handed the net result, in cash.
Q. I show you the entries in the cash book, 18th August, 1905, and ask you to state whether these two pages are in your handwriting (referring to pages 162 and 163)?
A. Yes, sir; everything.

The pages are offered in evidence.
Objected to as entirely immaterial and irrelevant.

The COURT: I don't suppose that entries in the books themselves are evidence; but if it is what he would say, that is a convenient way of stating.

Objection overruled. Exception.

The pages are marked Defendant's Exhibit U.

Q. On page 163 there is an entry; "A. Fellerman & Son, $267.73," and "Accounts $1,125," and on the opposite page, page 162, there is an entry, "Commission A. Fellerman & Son, $261.62, Commission A. Fellerman & Son, $124.78." Will you explain these two entries to the jury, please?

A. The entry on page 162, that is the credit entry; the receipt of commission to the extent of $386.40, it being the amount due us on the transaction according to the contract, which was subtracted from the balance of the $1,392.73, for which I received receipts.

Q. Did you balance your cash book on that day?

A. The cash was balanced on that day, yes, sir.

Q. Did you make up the accounts on that day?

A. Yes, as per the memorandum slips.

Q. Were there any entries made of these accounts in any
234 other book of the National Discount Company?

A. Yes, sir.

Q. What book.

A. A copy of the schedules was entered in the assignment book.

Q. Can you state what the assignment book contains with reference to these accounts?

A. It contains the name of each debtor transferred; it contains a record of the transaction, the name of the debtor, terms, gross amount, net amount, and the amount advanced on the page at the foot of the entry.

Q. In addition to the statement of these accounts, did you also receive shipping receipts from Mr. Fellerman?

A. I believe we did.

Q. You have in the book the dates of shipment entered?

A. Yes, sir.

Q. Was that taken from those shipping receipts that you received?

A. It was taken either from the shipping receipts or from the duplicate bills.

Q. After the entries in this assignment book, what other record was there made of this transaction?

A. These names were put from the assignment book on to ledger cards, which contained individual accounts with each debtor.

Q. Was there any other entry made of these accounts in any book?

A. Yes; from the cash book the total amount of the accounts assigned, both gross and net, the advances and commissions were entered in the record book, which is a style given to a ledger.

Q. And the book I show you is the record book (producing book to witness).

A. Yes, sir.

Q. And the account appears at page 190 thereof?

A. Yes, sir.

Q. What other entries of this transaction were there made?

The COURT: It can't bear on the question here of fraudulent transfer; they made the assignment in the ordinary course of business.

235 Mr. ELKUS: I will concede that you took every precuation that you possibly could do, so that you got what you wanted, and that you knew all about it when you got it.

Q. What other entry was there in any other book?

Objected to as irrelevant, incompetent and immaterial.

A. I can't recollect.

Q. How long have you been a bookkeeper?

A. About twelve years.

Q. Did you start these books for the National Discount Company?

Objected to as immaterial. Objection sustained. Exception.

Q. You knew Mr. Ralph Nathan, did you not?

A. Yes, sir.

Q. These cash receipts that contain the signature of Mr. Ralph Nathan, I show you the one in July, 1905, for the sum of $40; was that signed in your presence.

A. I can't recollect whether it was signed in my presence or not.

Q. Did you have charge of the cash at that time?

A. I had the superintendence of it.

Q. Do you know whether or not such a payment was made to Mr. Nathan?

A. I know that there were payments made to him; I can't recall whether this is the exact one.

Q. Did you ever have possession of this receipt, and these others that I show you (producing papers to witness)?

A. I had possession of some receipts from Mr. Nathan.

Q. How many of these?

A. Here is one in my handwriting; I certainly saw that signed, because I made it out (being dated 29 August, 1905, for $45); and here is another one in my handwriting, and here is one dated July 5 for $55; the $45 one was signed by Mr. Nathan in my presence.

236 Q. When this was signed and the money was paid out, what did you do with this receipt?

A. Carried it in the cash drawer as a memorandum against Mr. Nathan.

Q. Was there then an account with Mr. Nathan in the books of the National Discount Company?

A. No.

Q. What other receipts are there.

A. This one dated July 5 is in my handwriting, $53.

Q. What did you do with this receipt?

A. It was carried likewise.

Q. And you didn't make any record of it in any other book?

A. No, sir; it was simply an advance.

Q. What about the other receipts?

A. They are presumably—one of them was with the other two by virtue of its date.

Q. But that is not in your handwriting?

A. No.

Q. Did you have these receipts in your cash drawer?

A. Yes.

Q. And the other two were paid when?

A. After I severed my connection with the company.

Q. That is September 16, 1905, for $20 and the 20th of November, the balance of $221.99.

A. Yes.

Q. And you were not there?

A. No, sir; I wasn't there at that time.

Q. Was this money that was paid to Mr. Nathan when you went there, $45 and $55 and $40, was that charged up by you to any specific account then on the books of the National Discount Company?

A. No, it was carried on memorandum.

Q. I show you this receipt (producing receipt to witness), the 5th of July, 1905, and ask you to look at these words in lead pencil, "On memo." and state in whose handwriting they are?

A. They are mine.

237 Cross-examined by Mr. ELKUS:

Q. Mr. Nathan was one of the attorneys of the National Discount Company?

A. Yes, sir.

Q. And how many cases or matters in charge did he have for them at that time?

A. He had two or three.

Q. He always had two or three while you were there, didn't he?

A. Oh, he was doing work all the time while I was there.

Q. And had been doing work before this money was paid to him?

A. He had had cases from us, yes, sir.

Q. Collections, or only cases?

A. Collections and cases.

Q. And he had been receiving and was entitled to other moneys than these, or was that the only money that he ever got?

A. Oh, no; he got other money.

Q. Where does that appear?

A. In the book.

Q. Was it paid in cash in the same way?

A. It was paid in cash.

Q. Were there receipts for it?

A. Yes, there were receipts for it.

Q. Carried as memoranda?

A. Not necessarily.

Q. Where were they kept?

A. Oh, as I recollect there may have been one or two similar transactions to this, where he got loans of money paid out.

Q. These are the only receipts that are produced of a number?
A. There are some others.
Q. There must be a great many more?
A. Not a great many.
Q. Some others?
A. Yes.
Q. Did you decide that these should be charged to Fellerman?
A. I didn't decide anything; I simply paid out the amount to him.
Q. All you know is he got that money?
A. He got that money and I paid it on memorandum.
Q. You don't know whether he paid that back after you left or not?

A. No, sir.

238 Q. You don't know whether he got $221.99 or not, do you?
A. No, sir.
Q. Were you a stockholder of this company?
A. Yes, sir.
Q. Are you now?
A. No, sir.
Q. How many shares did you hold?
A. One.
Q. Just to qualify you?
A. Just to qualify me.
Q. Did you really own it, or hold it?
A. Well, I had it when I had it, and I gave it back when I got through with it.
Q. You didn't pay anything for it?
A. No, sir.
Q. It was freely and voluntarily given and you freely and voluntarily returned it?
A. Yes, sir.
Q. The second time you saw Fellerman there—you weren't there all the time he was there, were you?
A. No, I wasn't present at the entire interview; I was just called in and got my instructions to get $3,000, and went out.
Q. That was your business, and you attended to it?
A. Yes.
Q. And you don't know whether Mr. Woerbling was there or not?
A. No, sir; I don't recollect having seen him there.
Q. Did you say he was not there?
A. I say that he was not there, so far as I am concerned, because I didn't see him.
Q. You mean you don't recollect seeing him?
A. I don't recollect seeing him.
Q. That is as far as you will go?
A. Yes, sir.
Q. As far as you were concerned, the transaction at that time was simply a direction to you to get a thousand dollars and give it to Fellerman?
A. Yes, sir; and procure the proper receipt.
Q. Was there any reason, so far as you know, from the bookkeep-

ing standpoint, why a check couldn't have been given to him for the net amount that he finally received?

A. No particular reason, no, sir.

Q. Do you know of any general reason?

239 A. I might state that the general reason was that we did much of our business in cash.

Q. You did?

A. Yes, sir.

Q. Outside of those two reasons no particular reason and it happens that you did most of your business in cash, from the bookkeeping standpoint there wasn't any reason, was there, at all?

A. No, sir.

Q. It was perfectly easy to do just what you did with the check?

A. Yes, sir.

Q. Wasn't it for a check for $1,000.22 that you finally gave him?

A. That was the cash.

Q. I mean cash, for $1,000.22?

A. Yes, sir; that word "check" doesn't mean anything.

Q. These slips are all you had to show the transaction?

A. Yes, sir.

Q. And the word check is printed on it?

A. Yes, sir.

Q. And that was the amount that he finally got, ten hundred dollars and twenty-two cents?

A. Yes, sir.

Q. You didn't go through the form of giving him $1,360 in one hand and holding out the other hand and saying, "Give me back $270"?

A. I have no recollection about that.

Q. Did you do it?

A. No, sir; I don't believe I did.

Q. That would be absurd?

A. Well, it might be superfluous.

Q. Mr. Levison says that was done?

A. Well, perhaps it was; I have no recollection about it.

Q. Do you say it was, or it was not?

A. I will say that I don't recollect having done it.

Q. You do most of your business in cash?

A. Yes, sir.

Q. In this transaction, however, you drew a check to the order of Fellerman?

A. Yes, sir.

Q. By the express direction of Mr. Levison?

A. Yes, sir.

240 Q. Was there any particular reason for making that check?

A. No, sir; except that we paid in check unless requested——

Q. I ask whether he expressed any reason to you——

A. No, sir; he expressed none.

Q. You say you generally paid in check unless cash was asked for?

A. Unless cash was asked for.

Q. Didn't you tell the jury a moment ago that you always paid in cash, as a general rule?

A. We did most of our business in cash.

Q. Most of the people asked for cash?

A. Yes, sir; most of the people asked for cash.

Q. When Mr. Fellerman asked you for cash instead of a check, that was the usual thing?

A. Yes, sir.

Q. But still you thought it so unusual in his case that you went in and talked with Mr. Levison and asked whether you should get the cash?

A. No, sir; I merely asked because I didn't have that amount of cash on hand.

Q. You knew where to get it?

A. But the check had already been signed and made out.

Q. Didn't you know that he could endorse it and you could identify him?

A. Yes, sir.

Q. But you took him into Mr. Levison's private room and after some discussion between Fellerman and Mr. Levison you were told to go to the bank with Fellerman and get the check cashed?

A. Yes, sir.

Q. Did Mr. Fellerman say anything to you about having a note to meet?

A. He mentioned that in the course of conversation.

Q. Before you went in to Levison, or while you were with him?

A. I don't recollect; either one or both.

Q. He told you what bank the note was on?

A. No, sir.

Q. Didn't you tell him that he could get the check certified,
241 and put it in the bank?

A. I don't recollect.

Q. You knew he could?

A. Oh, yes; I knew checks could be certified.

Q. You knew anybody's bank would take a check certified by any other bank?

A. Yes, sir.

Q. Was there any other reason given except that he had a note to meet?

A. None whatever.

Q. What was the discussion between Mr. Fellerman and Mr. Levison?

A. As to whether or not he couldn't use the check.

Q. And he said he couldn't use it because he had a note in the bank to meet?

A. That was due that day.

Q. And he had to have the money?

A. He had to have the money, the cash.

Q. He wanted to deposit the cash instead of the check?

A. Yes, sir.

Q. Was anything said about a certified check?

A. I don't recollect any conversation in regard to certifying that check; no, sir.

Q. You remember this particular transaction very clearly, don't you?

A. I can't say that I remember it any more clearly than I remember the rest of the transaction; remember the personality.

Q. Do you remember distinctly what Mr. Levison said when you came in his room when the contract was signed, in the presence of Fellerman, that he had agreed with Mr. Fellerman—or are you testifying from what your general custom and habit is?

Objected to on the ground that the witness did not so testify; the testimony is that he was handed the contract and told to put these things in and that he was not present at the conversation.

The question is read to the witness.

The COURT: Let the witness state.

242 A. Strictly speaking, I presume I can testify from both points of view; that is, partly from recollection and partly from a refreshed recollection incident upon the production of the contract.

Q. Have you ever testified before about these facts?

A. Yes, sir.

Q. In what cause?

A. In the Stitch matter.

Q. In a suit brought by the trustee against Stich?

A. Yes.

Q. And you say, as I understand you—and correct me if I am wrong—that Mr. Levison called you in and said, "Put in 75%, we are going to make advances and five per cent. commission;" is that right?

A. Yes, he told me to put that in; yes, sir.

Q. And that was all?

A. And have the contract signed.

Q. Did Mr. Fellerman sign it in your presence?

A. My recollection isn't clear on that point.

Q. You brought it back and gave it to somebody, and the next you knew the contract was signed; do you know whether or not Mr. Fellerman brought that contract there already signed?

A. I can't state that; no, sir.

Q. And that it was handed to you already signed by him, and that you filled in the blanks afterwards?

A. No, I don't recollect anything of the kind.

Q. Do you know whether that is so or not?

A. I should say it was not so.

Q. From your general custom, or from recollection?

A. From both.

Q. You usually don't do it?

A. No, sir; I usually don't do it.

Q. Do you know whether or not Mr. Fellerman took this paper

away with him, it having been given to him by Mr. Levison and brought it back signed?

A. I will not state positively; I can't recollect.

243 Redirect examination by Mr. GAINSBURG:

Q. When this paper was handed to you by Mr. Levison, this contract, the time that you wrote in these figures and dates and amounts that you have written, will you state whether or not this signature of A. Fellerman & Son appearing twice upon one page thereof, was there or not?

A. No, I don't believe it was; I can't swear positively on recollection, but that would have been entirely out of the custom, and against——

Mr. ELKUS: I object and move to strike out the answer.

It is stricken out by request.

Q. But you are certain that the statement about the five per cent. charge was made in the presence of Mr. Fellerman?

Objected to as leading. Objection sustained.

Q. Can you state what was said to you by Mr. Levison in Mr. Fellerman's presence in relation to the charges at that time?

Objected to as repetition. Objection sustained.

Q. In the Stich matter you testified as a witness for Mr. Elkus, did you not?

A. Yes, sir; I was subpœnaed by that firm.

Q. And you were called for the purpose of showing the difference between the way you transacted business and the manner in which Mr. Stich transacted his business, were you not?

Objected to. Objection sustained. Exception.

Recross-examination by Mr. ELKUS:

Q. These cash payments that you made to Mr. Nathan were authorized by Mr. Levison, were they not?

A. Yes, sir.

Q. And paid by his direction?

A. Yes, sir.

244 MAX W. SOLOMON recalled.

By Mr. GAINSBURG:

Q. You were requested to be here this afternoon by me, were you not?

A. Yes, sir.

Q. Will you state whether or not you ever brought Mr. Schiller to Mr. Levison at the office of the National Discount Company about this Fellerman matter?

A. No, sir, I did not.

Q. Do you know of any transaction or business of any kind between the National Discount Company and Mr. Fellerman?

A. No, sir.

Q. Do you know anything of any guarantee to the National Discount Company with reference to the Fellerman matter?
A. No, sir.

Cross-examined by Mr. ELKUS:

Q. Do you know Mr. Schiller?
A. Yes, sir.
Q. What is his first name?
A. Eugene Schiller.
Q. Is he a friend of yours?
A. Well, an acquaintance.
Q. A son-in-law of Mr. Fellerman?
A. Yes, sir.
Q. Did he come to see you before you went down to the office of the National Discount Company with Mr. Fellerman?
A. Did who come with me?
Q. Schiller?
A. No, sir.
Q. Did you ever see him before that?
A. No, sir.
Q. Where is his place of business?
A. It was on Grant street then, but on Sixth avenue now.
Q. What is his business?
A. Women's apparel, I guess.
Q. In business for himself?
A. Yes, sir.
Q. Do you do business with him?
A. No, sir.
Q. Is is the same line of business as yours?
A. No, sir.
Q. What did you say yours was?
A. Clothing.
Q. Women's clothing, or men's?
A. Men's clothing.

245 EDWIN J. DEBOLD recalled:

By Mr. GAINSBURG:

Q. Do you recall either at the first interview with Mr. Fellerman at which you were present, or at the second interview at which you were present, whether anything was said by either Mr. Levison or Mr. Fellerman with reference to the purchase of stock by Fellerman in the National Discount Company?
A. Not in my presence, no, sir.
Q. Or was there anything said in your presence of any transfer of stock to the wife or daughter of Fellerman?
A. No, sir.
Q. Or what disposition was to be made of the equity in the accounts?
A. No, sir, none whatever.

Cross-examined by Mr. ELKUS:

Q. You told us all that took place while you were there?
A. Yes, sir.
Q. And you were there only a few minutes?
A. Yes, sir.
Q. Did you ever see that guarantee by Schiller?
A. No, sir, I can't recollect that I ever did.
Q. It wasn't given to you by Mr. Levison?
A. I don't recollect anything about it.

RALPH NATHAN, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. GAINSBURG:

Q. You are an attorney and counsellor at law?
A. I am.
Q. And your office is 53-63 Park Row?
A. No; 1 Liberty Street.
Q. In 1905 wasn't it 53-63 Park Row?
A. Yes, sir.
Q. You have been practising for how many years?
A. Over sixteen years.
246 Q. You know the National Discount Company?
A. Yes, sir.
Q. And in 1905 you conducted legal business for them?
A. I did.
Q. Mr. Levison, I understand, is distantly related to you?
A. He is.
Q. Do you remember some time in August, 1905, there being turned over to you some accounts of Fellerman & Son for collection?
A. I recall it.
Q. State what you recall about that transaction?
A. I recall that a number of accounts in the Fellerman account was handed to me for collection, and I wrote a number of letters to the various parties, the debtors to the Fellerman account, and I believe in some instances, three or four letters; and whatever checks came in to me I turned over to the National Discount Company.
Q. I show you a letter addressed by you to the Horn Supply Company and ask you to state whether that is one of the forms of letters that you wrote about various accounts that were turned over to you for collection?
A. That is one of the forms I use.
Q. You stated that you believe the indebtedness is past due?
A. I do.
Q. And I have another copy of a letter, Olds Wortmann & King: is that one of the letters you sent?
A. Yes, sir, that is one of the letters I sent.

It is offered in evidence.
It is marked Defendant's Exhibit V.

Q. And all the correspondence on this subject matter did you immediately communicate to the National Discount Company?
A. Yes.
Q. Did you render these bills to the National Discount Company marked Defendant's Exhibit L?
A. I did; except the first one; that was a large sheet.
Q. Does this bill in addition to the transaction of the matter of Fellerman—that also refers to two other cases?
A. Yes, sir.
247 Q. And the outside was on the one statement $381.99, and on the other $32.78?
A. I believe one is included in the other.
Q. No; they are separate; did you give them credit on this bill for $160?
A. Yes, sir.
Q. You say here, "Received on account $160;" will you state when you received that money?
A. I can't recall it now, sir.
Q. I show you these receipts, signed by you, and ask you to state whether these receipts contain your signature?
A. They do.
Q. Did you receive the money on the days these receipts purport to have been signed by you?
A. I did, sir.
Q. And are these payments part of the $160 credit that you give them on your statement?
A. That I couldn't recall.
Q. Did you owe them any other money?
A. Well, I should have to state the manner in which the business was done. I would once in a while with the National Discount Company want some cash after banking hours and I would say, "Let me have $25 or $50 or $40," or whatever the amount was; and one of those slips would be presented to me and charged against my account, and I would receive the money, and when I sent in my final bills those slips were presented and deducted. I can't recall now whether those were charged against this account or not.
Q. But you do recall, do you not, that when you gave them credit for the $160, returning a balance of $221.99 that you received that on the 20th day of October, 1908?
A. That entire slip is in my handwriting, and I received it on the day that I dated it.
Q. And that was the balance of your bill as rendered by you?
A. Yes.

248 Cross-examined by Mr. ELKUS:

Q. Did you get that in cash?
A. I couldn't recollect that now.
Q. These two letters that you have produced—they are original letters, aren't they?
A. Yes.
Q. They have never been sent?

A. Oh, yes.

Q. How do you get them?

A. They are either returned with the letter making some comments about a shipment or they are returned because they are not found; I believe the Horn Supply Company was one, and that was not found, because we instituted an investigation to find out what business in that town would send something like that, the Horn Supply Company.

Q. Anything else?

A. Nothing else that you have asked.

Q. Olds, Wortman & King, did they bring this letter back to you?

A. It was sent back with a memorandum.

Q. Where is the memorandum?

A. I don't know; whatever I had I turned over to them.

Q. They wrote us a letter that they had no correspondence of any kind; does that refresh your recollection that nothing was turned over by you to them?

A. Oh, no; whenever I received money or check I would either call them up on the 'phone or forward it to them.

Q. In August or July or June or September, 1905, about how many cases or matters did you have for them?

A. I haven't had my memory refreshed.

Q. You can't tell?

A. No, sir; bear in mind that I have ceased to be their counsel for a period of two years.

Q. You are still the relative of Mr. Levison?

A. That don't make any difference to me.

Q. How are you related to him?

A. His mother and my grandmother are sisters; that is what I am told.

249 Q. Don't you keep copies of your letters?

A. No, I don't.

Q. You have been asked to examine all your records and find what you did with reference to this Fullerman matter?

A. I received a subpœna from your firm yesterday asking me to produce my correspondence.

Q. Is this all you can find?

A. I didn't find that; I didn't produce it.

Q. Where did these come from?

A. You will have to ask Mr. Gainsburg.

Q. You don't know where they came from?

A. I don't know where they came from, no, sir.

Q. Your services, as far as you recollect, were confined to writing letters?

A. Is this the case where Stern, Singer & Barr were attorneys for the receiver?

Q. Yes.

A. Well, I think there was considerable done between the attorneys and myself in this case. They tried to collect accounts that were due to Levison's, the National Discount Company.

Q. Did you get an injunction or anything?
A. That I can't recall.
Q. Can you recall anything but writing letters?
A. I recall speaking to witnesses, and remember about it; to Leonard Bronner, the attorney for the bankrupt, and writing letters.
Q. That was on behalf of the National Discount Company?
A. In the collection of the Fellerman accounts.
Q. Anything else?
A. That is about all, yes; instituting investigations against apparently fictitious accounts, like the Horn Supply Company; I think the Horn Supply Company is one, but I am not sure.
Q. These letters that you sent out were in a form which you used for the National Discount Company in all their cases?
A. No, sir.
Q. Was a special form prepared in this case?
250 A. No, sir, I dictated that; I think that was the first letter sent out.
Q. You dictated one letter and a copy was made and addressed to each concern on the list?
A. Yes, sir.
Q. And mailed by an office boy?
A. Yes, sir; I presume so.
Q. And that was all that was done?
A. Oh, no; there might have been more than that; there might have been a correspondence.
Q. Where is it?
A. I believe that there was a correspondence.
Q. Have you got it?
A. I have not; I have already explained that my connection with that Company ceased two years ago.
Q. Well, if anybody has it, they have; was this bill made in your office?
A. Yes, sir.
Q. At the same time; I mean was it made on two different occasions?
A. No, I think it was made—the Fitch matter I have made a charge of $100; it was a collection of a $2,500 note; an objection was made to that particular charge. I declined to take less, and some outsider interfered and said, "You split your bill and take your money," and then the $100 was erased, and $50 substituted, and the total corrected; I believe that was down in the National Discount office.
Q. At the same time were these two for the Fitch put on and the balance of the bill——
A. No, sir, I am pretty positive that all the typewriting was done in my office.
Q. Wasn't that all after the Fitch matter done in Mr. Levison's office?
A. No, sir.
Q. Do you keep a journal or a tickler?
A. No, sir.

Q. Don't you keep any record in your office of your business?
A. I do.
Q. What record do you keep?
A. In this particular case I had a special sheet.
251 Q. Where is it?
A. I haven't got it.
Q. What did you do with it?
A. I moved my office in August, 1907, and all cumbersome matter was thrown out, and that with it, because the National Discount Company was no longer a client.
Q. Don't you realize that all lawyers' records are matters of importance?
A. Some records are, and some are not.
Q. You knew that in the outset there had been some dispute in reference to these Fellerman claims by the receiver?
A. I believed that that matter had been settled long ago.
Q. Who told you that?
A. I was under that impression.
Q. Who told you that?
A. I say I was under that impression.
Q. Did Mr. Levison tell you so?
A. No, sir, I haven't spoken——
Q. Did anybody tell you so?
A. No, sir.
Q. You say you had a special sheet prepared for this particular case?
A. No; you declined to permit me to finish my answer, and either you let my testimony go down as I desire it——
Q. You answer my questions?
A. I answer your questions, but you can't put words in my mouth.
Q. I want to know whether you had a special sheet for Fellerman printed or prepared?
A. I did not.
Q. What did you say, or what was it you referred to when you said you had this account on a special sheet?
A. I say that I had a special sheet on which I copied the individual accounts; there was an envelope marked "The National Discount Company," and in that envelope there was a separate statement of each individual indebtedness due to Fellerman; there was either copied on this sheet or the original statements were retained by me; and that was placed by me in that envelope.
252 Q. Don't you keep any record in your books of your services that you perform for your clients?
A. My practice isn't so large that I need maintain or employ half a dozen bookkeepers.
Q. Did you collect any moneys yourself in the Fellerman matter?
A. I received some checks; yes, sir.
Q. To your order?
A. I think the Philadelphia Gimbel check was made to my order.
Q. Did you take off ten per cent. and send the National Discount the balance?

A. I always send my clients the check in full, and make the charge.

Q. Don't you keep a letterbook in which all letters you write are copied?

A. No, sir, your associate happens to know that.

Q. Does that make it any better?

A. I don't know what you mean.

Redirect examination by Mr. GAINSBURG:

Q. You say that you had a number of conversations with Messrs. Stern, Singer & Barr, who were the attorneys for Mr. Van Iderstine, with reference to some accounts which were fictitious; I show you this statement and ask you if that does not refresh your recollection—where it is claimed that the account had been paid to A. Fellerman & Son, and ask whether that was not turned over to you for investigation with the receiver?

A. Yes.

Q. I also show you this statement, where it says that "The above bill was remitted to A. Fellerman on August 15th." and ask you whether you did not investigate that bill with Messrs. Stern, Singer & Barr as to whether the receiver of Fellerman——

A. I did, sir, that is the Olds Wortman & King account as to which I have already been interrogated.

Q. Did you have any conversation with Messrs. Stern, Singer & Barr concerning this account of Lucas, where the merchandise was returned and so on?

A. Yes, sir.

253 Q. And with reference to this account of Charles E. Lynch, where it is claimed that the goods were returned on August 26th to A. Fellerman?

A. Well, I don't recall the name Lynch.

Q. And with reference to the account of Lind & Murphy where it was claimed that $99 worth of goods was returned; the letter is dated August 22d?

A. I can't recall that name, but all the Fellerman's accounts were investigated by me.

Q. And Chase's Drygoods House, wherein your letter was referred to?

A. I recall that account.

Q. Cæsar Misch, wherein your letter was referred to?

A. I recall that account.

Q. And W. B. Stevens & Company, wherein your letter is referred to?

A. There is a note written on my letterhead.

Q. The fashion of Minneapolis, Minn., with reference to a claim by the receiver?

A. Yes, sir.

Q. W. J. Fitzgerald, with reference to a reduction?

A. I don't recall that.

By Mr. ELKUS:

Q. All these letters are addressed to the Discount Company?

A. Some of them are; one of them is addressed to me on my letterhead from Albany, Oregon.

Q. They wrote something at the bottom of the letter?

A. Yes, sir; a memorandum on my letterhead; I believe that was the second letter sent to that company; different in amount to the other; that was the second letter addressed.

By Mr. GAINSBURG:

Q. Can you state the number of accounts that you received from the National Discount Company?

A. You mean in this particular account?

Q. Yes, I mean in this particular account?

254 A. My recollection is $4,000 or $5,000, or perhaps less than four.

Q. And isn't it a fact that you made your charge and received payment only on those accounts that were past due?

A. That were past due and paid; those that were not paid I wasn't paid for.

Q. Although the account was handed to you, if not paid, even though it was past due, you made no charge and received no money?

A. No, sir.

Q. And those accounts that were turned over to you, not yet due and which were thereafter paid, you made no charge and received no money?

A. That is right.

Recross-examination by Mr. ELKUS:

Q. And you kept the account- until they were past due?

A. No, I did not.

Q. You rendered your bill some time in November?

A. I did.

Q. And at that time all the accounts were past due, weren't they?

A. At the time I rendered my bill, yes, sir; my services had been rendered at that time.

Q. Did you keep a bank account in 1905?

A. During part of the year 1905 I did have a bank account.

Q. And the latter part of the year?

A. No; I think it was until August or September, 1905.

Redirect examination by Mr. GAINSBURG:

Q. At the time you rendered your bill all these accounts had been past due, and the bill that you rendered for the accounts had been paid?

A. Yes, sir.

Q. But they were not paid before they were due?

A. No, sir.

255 Recross-examination by Mr. ELKUS:

Q. You say that if any account was handed to you that was not due, you made no charge?

A. Exactly.

Q. These accounts were handed to you, when?
A. I can't recall the date.
Q. Well, the first letter you wrote; look at it and see if that doesn't refresh your recollection, August 24?
A. They were given to me about that time.
Q. They were given to you, sure, before that day?
A. Yes, sir.
Q. Will you tell me what accounts were past due on August 24?
A. I can't recall.
Q. Were there any past due?
A. I can't recall.
Q. Here is a list of the accounts with dates—there is a list which has been furnished to me by the opposing counsel; show me what accounts were past due on October 24, 1905?
A. Cæsar Misch, $280.75.
Q. When was that due?
A. June 15, and August 18.
Q. And the next?
A. Lucas, due August 1st.
Q. How much was that?
A. $201.17.
Q. And the next?
A. Whitehouse, $138.
Q. When was that?
A. August 20th.
Q. Next?
A. Phillipsborne, July 2d, $7.44, and July 7th, $8.18; August 8th, $53.35; Goodman, Lind & M??? August 25.
Q. Well, that wasn't due on August 24th, was it?
A. No, but very close to it.
Q. But I am asking about past due ones. Any more?
A. Yes; where is Plummer, July 26th, August 17th and August 26th?
Q. And some due on each date?
A. Yes, I presume so.
Q. How much was due before August 24th?
A. I can't tell you from this account.
Q. What is the amount of the account?
256 A. $79.98. Sticks, Barr & Fuller, July 23d, August 22d and August 24th.
Q. How much was due on each date?
A. I don't know; $209.82.
Q. Any more?
A. That is the end of the list.
Q. You collected on those accounts less than $1,000, did you, that were past due, that you have read?
A. Well, that is a matter of calculation; you can calculate as well as I can; other accounts were due on or about that date.
Q. But your statement to Mr. Gainsburg was, under his leading question, that wherever the account was not past due you made no charge?

A. Exactly; or I will modify that by saying that where it was due about that date; August 25th or 26th, or very close to it.

Q. Have you any more modifications?

A. No, sir.

Q. Isn't it a fact that you made up this bill in Mr. Levison's office at his suggestion and at his request?

A. It is not; my stenographer had a peculiar way of making the letter L for a 1, and we find at the close of the bill the letter L, received on account L.16, instead of 1.60, which is after the portion which you claim was made up in Mr. Levison's office.

Q. You mean that the stenographer in every case made an L instead of a 1?

A. I don't know whether it was in every case.

Q. Let me show you this bill and the list of figures $311.69 and I will call your attention to the fact that there the stenographer did not make an l for a 1; that is so, isn't it?

A. She made a small l for 1 in that case; but succeeding that is a capital L.

Q. You say there is a small l——

Mr. GAINSBURG: I submit that this has gone far enough.

Mr. ELKUS: That is all.

(Defendant rests.)

(Testimony closed.)

257 Mr. GAINSBURG: I renew my motion to dismiss; I think that Mr. Elkus' statements to your Honor at the end of his argument, succeeding that of Mr. Levis on my motion to dismiss the complaint, was to the effect that your Honor has the right and the power to do so at the end of the entire case—and that it was a question of fact, and your Honor has a right even at the end of the defendant's case to consider our motion to dismiss the complaint.

I think now we have the actual facts, and I think that upon all the evidence the plaintiff has failed to make out a cause of action; I do not think it is necessary for me to repeat the statement made to your Honor at the end of the case; while it is true that fraud cannot be established by the direct evidence which is the best kind of evidence to have, yet I submit that upon all the evidence in this case there is not an issue raised here and there is nothing entitling the plaintiff to go to the jury.

The COURT: I think it is a question for the jury and I will deny your motion.

Exception.

Counsel summed up the case.

Judge's Charge.

HOLT, *J.*:

Gentlemen, this case is brought by a trustee in bankruptcy to recover the value of certain accounts alleged to have been assigned by the bankrupts just before the filing of the petition to the defendant

the National Discount Company with the intent to defraud their creditors.

258 There are two provisions in the Bankrupt Act upon which this case may be based. Section 67-*e* provides:

"That all conveyances, transfers, assignments or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration."

And:

"And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Then, Section 70-*e* provides:

"The trustees may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication."

259 Now you will perceive there is specific provision here for the recovery of property transferred to defraud creditors, and also a provision that any such transfer, which is null and void under the laws of any State, may be null and void under the Bankruptcy Act, and that any steps which might be taken, by any creditor under such laws may be enforced by the trustee in bankruptcy.

The laws of this State, for instance, and the laws of other States in respect to conveyances to defraud are very similar to this first provision in the Act. In case such a conveyance has taken place any creditor who is a judgment creditor, and who has issued an execution and had it returned unsatisfied, can bring an action in equity to set aside such fraudulent transfer.

Under these provisions, in the first place, the conveyance must have taken place within four months; in this case there is no controversy but that whatever did take place took place within a few days. The petition in bankruptcy was filed August 19th, and the first assignment of accounts took place on the 15th, and the second assignment of accounts took place on the 18th, so that there is no question before you in regard to the time.

In the next place the transfer must have been done when the bankrupt was insolvent. Of course, a man might make a transfer of poperty several months before he is in bankruptcy, and be solvent at that time, and you must be satisfied upon that point that the

Fellermans were insolvent when the transfer was made. The evidence upon that subject is in substance the evidence of the daughter that Fellerman & Son owed about $38,000 on the 15th, and about $31,000 on the 18th, and that there was due to them about $12,000 in debts. The trustee testifies that the total amount of the assets, that is, the appraised amount of the assets was about $5,000;
260 a little over $5,000; and the total amount that he has collected is between nine and ten thousand dollars, and, of course, some of those collections were debts which the daughter put in as among the $12,000 that were due; so that upon the evidence, the highest amount, from any point of view that you can figure on the value would be $12,000 and $9,000, which is $21,000 as against an indebtedness of $31,000.

Of course, it is for you to say, under the circumstances whether the Fellermans were insolvent at the time, but I should not suppose you would have much difficulty with that branch of the case.

Then you must find in this case that this assignment was made by the bankrupts with the purpose to hinder, delay and defraud their creditors.

Now the evidence is that when the last lot of accounts had been transferred Fellerman had about five hundred dollars' worth of accounts left. He had had this consultation with Bronner when the last sale took place, this consultation about going into bankruptcy, and he had been in consultation with Werbling, his prospective son-in-law, who brought about the meeting with Bronner and he had got this money. With $3,000 he paid off a note to which his son-in-law, a relative, was a party and the other thousand dollars was also used, as I recollect it, to pay obligations. As far as appears in this case they were actual indebtednesses; but it is very often the case in bankruptcy that when a man finds out he is going to fail he turns his assets into cash, and with that cash pays certain creditors, whom he wants to have paid, and leaves the others without payment; and that comes just as much within the provisions of the Bankruptcy Act as if he had turned his property into cash and hidden or concealed it for his own purposes. The substantial object of the Bankrupt Act is to require a man who is insolvent to have his
261 property distributed ratably among his creditors. And it appears in this case that Mr. Fellerman was engaged, just on the eve of bankruptcy, in turning his accounts into cash, and paying with it certain favored creditors, leaving the great mass of his mercantile creditors from whom he got the goods which he had sold, for which he got these accounts, without any provision for the payment of their debts.

It is for you to say under those circumstances what his purpose was; and I should suppose on the evidence in the case that you would not be troubled very long in coming to a conclusion on that point.

Now, if you find that the Fellermans were insolvent at the time, and that the Fellermans' purpose was to hinder, delay and defraud their creditors within the meaning of the expression in the Bankrupt Act, as I have explained it to you, then the serious question in

this case arises whether the National Discount Company was "a purchaser in good faith and for present fair consideration," or as expressed in another part of the Act, "a bona fide holder for value." These conveyances, the first part of the Section says, "shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration." And the other provision of the Act provides that the property may be recovered from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication.

Those two expressions are about alike, and the question arises, therefore, in this case, and it is the important question in the case so far as the defendant the National Discount Company is concerned, was it a purchaser for a fair consideration, or for value, and was it a purchaser in good faith. The two things are necessary to be found by you. If a man buys property from a person who
262 is insolvent, for the purpose of helping him in a scheme to defraud, and he knows that that is the purpose, he is a party to it, and he is responsible to the creditors who are defrauded whether he pays full value or not.

On the other hand, if the question is whether he is purchasing in good faith, the amount that he pays is a pretty important element of evidence. If a man purchases property at its full value, the fact, so far as it goes, if there are no other facts in the case, is pretty weighty evidence that he is carrying on an honest transaction, and on the other hand, if he buys property at a very small amount a very much less amount than its value, that is immediately a circumstance which is suspicious, and if the amount is very small it has very great weight in determining the good faith of the transaction.

This was not a purchase of property, it was a loan, an advance on the security of property; and, therefore, the ordinary principles that apply to the purchase of property do not apply—that is, the principles apply but the way in which you consider it would be different.

If the evidence in this case showed that the advances were made in the usual manner, at a reasonable rate of compensation for the advances, that would be weighty evidence of the good faith of the defendants in this transaction.

On the other hand, if in your opinion the amount of compensation reserved under the contract was excessive, that is a circumstance to be taken into consideration by you in passing upon the good faith of the defendant the National Discount Company in this transaction.

On the question of good faith, the evidence upon which the plaintiff relies in this case is—first, they say that excessive commissions were exacted, or were taken, in this case; there was a pro-
263 vision in the contract for six per cent. interest on the advances, and for five per cent. commission on the gross amount of the accounts; and the counsel for the plaintiff argues that five per cent. commission on the gross amount of the accounts, irrespective of what amount may be advanced, and irrespective of the amount for which the accounts were to run, would, if carried on as a regular business upon short accounts, amount to a very heavy commission. It is for you to say what weight is to be given to that fact.

Then there is the fact that the plaintiff relies upon that cash was asked for, and was paid. It seems the first payment of $3,000 was made before the defendant had had an opportunity to make the usual inquiries for confirmation of these accounts. It was asked right away of the defendant, and then when the check was drawn for the amount, Mr. Fellerman said he had to pay a note which was due that day, and he didn't want to take a check, but he preferred the cash to deposit in the bank.

Then there is the point that Mr. Lewis, the clerk, was sent down to Fellerman's to examine the books and accounts. The plaintiff's counsel claims that he did go there to see about the condition of the books, and I think the daughter of Fullerman, the bookkeeper, said that he did go over the accounts. Mr. Lewis says that all he went there for was to attend to having the accounts stamped on the book as having been transferred, in accordance with their usual custom, and that he did so in a few cases, and told the bookkeeper what should be done in such cases; and that that is all that he did, and that he did not make any further examination into the condition of the business.

Then there is evidence given by Fellerman in substance to the effect that while they were talking about this matter, Mr. Levison, the President of the defendant, said to him that he might
264 purchase some stock in the defendant's company; he would issue stock to him then, as I understood it, and that it would be paid for by the equity in the accounts when they should be collected; and Fellerman says that Levison said that he could turn over that stock to his wife or daughter.

Now Mr. Woerbling testifies that he did make the suggestion of selling the stock, but he says he didn't hear any suggestion of turning it over to the wife or daughter. The defendant denies that any such conversation took place. It is to me questionable whether, if this were done, it would have been a very clever scheme to conceal the hiding of property; there would be the stock issued, and it would be investigated.

The trustee in bankruptcy naturally would call upon the National Discount Company for the proceeds arising from the equity in the accounts and if the National Discount Company said, "We bought this equity," the trustee would ask, "With what," and then the answer would have to be "with the stock," and there would have been the stock and it would have been easily traced. But it is for you to say whether there was any such suggestion, and if it was made, whether it indicates any knowledge or suspicion on the part of the President of the National Discount Company, the defendant, that Mr. Fellerman at the time was turning these accounts into money for the purpose of making use of the money to defraud the rights of his creditors after he went into bankruptcy.

That appears to me to be the substantial evidence in the case on the plaintiff's side.

Now, the defendants have given evidence in their own defence. Mr. Levison says that Mr. Fellerman was brought to him by Mr. Solomon, who was one of their stockholders, and an acquaintance

of Mr. Levinson's; that he introduced him to him as an old business man in good standing and reputation. Levison says that
265 Fellerman told him that he was doing a business of from $100,000 to $125,000 a year; that he thereupon looked up his rating in Dunn and Bradstreet, and that he found him rated in Dunn and Bradstreet at from $50,000 to $75,000 worth of property over and above his liabilities, and as being in fair or good standing; as I remember it, one had him good, and the other fair standing as a business man. He apparently had been in business many years, and there is no evidence that he was ever in any business difficulty before.

Mr. Levison says that the terms and commissions in this case were such as were usually taken; he says that cash is often paid in such transactions, and that in this case the large amount of cash was simply a cashing of a check after it had been drawn, when he had expected to pay it in a check. He denies absolutely that there was any suggestion to sell his stock for the equity; he shows that there never have been issued but $75,000 out of the total amount of the stock, and he produces his books and papers, and the books seem to be accurate and full and well kept. The contract was a contract on a printed form, which he uses with all customers, and he says, therefore, that this was an ordinary business transaction; that he knew nothing about there being any bankruptcy pending, or that it was different from any other case in which he is accustomed to advance money on accounts.

Gentlemen, you should give this testimony fair and candid consideration. In such a case as this the plaintiff is entitled to bring in all the evidence which bears on the question of the fraud of the bankrupt, because one of the issues in the case is whether the bankrupt intended to commit a fraud on his creditors. But the evidence given on the subject of Fellerman's intent to defraud ought not to weigh against the defendant the National Discount Company, the party to whom the property was transferred, except so far as
266 it relates to subjects which that defendant knew about, or had reason to suspect.

In asking the question whether the defendant the National Discount Company was a purchaser in good faith for a fair consideration you should only consider the evidence relating to what that Company knew of at the time, or would have been called upon to suspect from the circumstances of the case.

Of course what a transferree of property under such circumstances knows is evidence against him; but the liability of a person who takes property under such circumstances, is not confined to what he knows. There are people who make advances on property at a low rate, who do not wish to know anything about the circumstances and who abstain intentionally from making any inquiry, but under such circumstances that a reasonably prudent man would be put upon inquiry and investigation. If that is the case here you are justified in finding the defendant just as liable as if he did know all the facts. But if the transaction was entered into by the National Discount Company in entire good faith, without any sus-

picion and without any knowledge of any such facts as would put a reasonably prudent man upon investigation, then you should find a verdict for the defendant.

Now, gentlemen, this is an important case on principle; the amount involved is not very large, but it is an important case on principle, because the great difficulty we have in the administration of the Bankruptcy Act is in this business of transferring property and accounts just before bankruptcy and either hiding the proceeds for the benefit of the bankrupt or paying relatives' debts leaving nothing or very little with which to pay the regular business creditors. And, therefore, it is important in cases of this kind that the jury should investigate carefully and
267 fairly; and if they find that a person is making advances or buying accounts or goods from a man just on the eve of bankruptcy, and he in fact by that method is enabled to cheat his creditors, the party who has enabled him to do so should be held accountable for it unless he was a bona fide purchaser for value.

But because such a case is important, that is no reason whatever why you should find a verdict against this defendant the National Discount Company. It should be judged in this case on the evidence in this case, and nothing else. You should look at the evidence with perfect candor and fairness, and if the plaintiff has not established, by a preponderance of evidence, the right to recover, you should find a verdict for the defendant; but if he has so established his case, then you should find a verdict for the plaintiff.

The burden of proof in this case is upon the plaintiff, and the plaintiff must establish by a preponderance of evidence the claim that he maintains in this case. He must establish that on the day that Fellerman took those accounts to the defendant he was insolvent, that he was intending to cheat his creditors, and that the defendant was not a purchaser in good faith and for a present consideration.

In passing, however, upon the evidence in this case, as in all such cases, you should bear in mind that the trustee in bankruptcy is at a considerable disadvantage in such a case. He usually knows nothing personally about the facts; he stands as a trustee for creditors, but all the transactions took place before he came into the case, and if the charge is correct, and if it is a case where there has been cognizance between the bankrupt and a man to buy his property for less than it was worth, and in that way to help the bankrupt to turn it into cash so that he can more easily conceal it or apply it to such purposes as he wants, in such a case as that
268 you will understand that it is difficult for a trustee to get his evidence.

Of course the interests of the witnesses in such a case must be taken into consideration. Fellerman has testified, himself. He admitted that he was hostile to these defendants, and there was very much in his evidence which was subject to criticism, I should think you would say. He was committed to jail for his manner of testifying, and for his conduct immediately after this transaction, and I should not advise you to give very great weight to what he

says, unless it is corroborated by other parties. But it is for you to say what weight you will give to all these witnesses, and after considering all the evidence in the case to reach such conclusions as you see fit.

The amount of recovery in this case should be the fair value of the accounts that were transferred.

Mr. ELKUS: We only ask $4,767.76, which was the amount that the defendants actually received, with interest from September 27, 1905.

The COURT: That is all that is asked; and they did receive that amount, and so there is no question that those accounts were worth that amount. If you find a verdict for the plaintiff you should find a verdict for that amount.

The COURT: I have received some requests to charge, and I think I have answered the points involved in them. If there is any point which has *has* not been covered, you may call my attention to it.

Mr. ELKUS: I request your Honor to charge the jury that if a verdict is rendered for the plaintiff, and the verdict is paid, that the defendant is entitled to become a general creditor of the bankrupt for the amount thus paid.

The COURT: I so charge.

The defendant excepts.

269 Mr. GAINSBURG: There is a provision in the Bankruptcy Law limiting the filing of proofs of claim to one year from the date of adjudication; in this case the Bankrupt was adjudicated in 1905, and it is apparent that more than one year has elapsed.

Mr. ELKUS: The trustee will consent to the allowance of the claim.

Mr. GAINSBURG: The trustee has no power to consent to anything of the kind.

Mr. ELKUS: There is a provision in the law by which if a claim could not have been filed in the year, the Court has the power to allow the claim to be filed.

Mr. GAINSBURG: But the trustee can make no such concession.

Mr. ELKUS: I ask you- Honor to charge the jury that they are not bound to believe the testimony that $344.77 was actually paid to Mr. Nathan, or to anybody, for collecting these claims.

The COURT: No, gentlemen. You are not bound to believe anything; you are to consider it and give it such weight as in your opinion it is entitled to.

Mr. ELKUS: In connection with your Honor's charge that the failure to inquire, or wilful ignorance, could be considered by the jury, I ask your Honor to charge that they can consider in that connection the report or statement which was put in evidence by the defendants, which was made by the mercantile agencies, both of them, with reference to the financial standing and the assets and liabilities of the Fellermans.

The COURT: I so charge.

Mr. GANESBURG: I except to that portion of the request, wherein it is stated that your Honor charged the jury that wilful iguorance on the part of the defendants is evidence of knowledge of
270 fraud on their part; and I except to the latter part of the request, as charged. I except to so much of your Honor's

charge wherein it is stated that it is very true, in cases of bankruptcy, when a man is going to fail, that he turns his assets into cash and pays certain creditors, and particularly to the portion of your Honor's charge that a preference is just as much within the provisions and within the terms of this Act as though he had concealed the same from the creditors. I also except to the further portion of your Honor's charge where you said that paying certain favored creditors, leaving most of the general creditors without any payment, is evidence of a fraudulent intent, and that from the evidence in the case it is a matter which the jury would not be troubled with in coming to a conclusion.

I also except to that portion of your Honor's charge wherein you stated that if in the opinion of the jury the amount of compensation was excessive that that is a circumstance to be taken into consideration in passing on the *bona fides* of the transaction.

I also except to that portion of your Honor's charge wherein you say that counsel for plaintiff contended that five per cent commission on the gross accounts would amount to a very heavy commission per annum.

I ask your Honor to charge the jury that the defendant had a right to advance moneys on accounts transferred to it by A. Fellerman & Son, and make such charges for commission, attorneys' fees, as was agreed upon between the parties to said contract.

The COURT: Yes, I so charge.

Mr. GANESBURG: I ask your Honor to charge the jury that where money is actually loaned on accounts transferred as security, the amount loaned, in proportion to the value of the security, is
271 not material in determining the question of a present fair consideration, and the *bona fides* of the transaction.

The COURT: I decline so to charge.

Defendant excepts.

Mr. GANESBURG: I ask your Honor to charge the jury that the cash transactions, being the payments on the accounts, in cash, instead of by check, are not, in themselves, any evidence of an intent on the part of the defendant, to hinder, delay and defraud creditors, and are consistent with honesty and fair dealing.

The COURT: It is consistent with honesty and fair dealing, but it is some evidence for the jury to consider, what weight they give to it is for the jury to say.

Defendant excepts.

Mr. GANESBURG: I ask your Honor to charge the jury that the defendant had a right to rely upon the truthfulness of the rating given to said A. Fellerman & Son by Bradstreet and Dun, the Commercial Agencies, in their rate books, and assume same to be truthful.

The COURT: I so charge.

Mr. GANESBURG: I ask your Honor to charge that if the jury believe the defendant did rely upon the rating of A. Fellerman & Son, in Dun's or Bradstreet's, it was not necessary for the defendant to make any further investigation as to the financial condition of A. Fellerman & Son, and the failure so to do, is not evidence of an

intent on the part of the defendant to hinder, delay and defraud creditors.

The COURT: Not necessarily, but it may be evidence; it is for the jury to say what weight they will give it.

Defendant excepts.

272 Mr. GANESBURG: I ask your Honor to charge the jury that the jury is to consider the fact that the Agency reports were made as of January 20th, 1905, and that they could not show, upon the face thereof, the existence of an obligation by way of a note, which was dated May 15, 1905, four months thereafter, and which matured on August 15, 1905, I make this request in view of the statement made by counsel.

The COURT: The jury may consider all the evidence in the defendant's case.

Mr. GANESBURG: I ask your Honor to charge the jury that the testimony is uncontradicted; that all moneys obtained by A. Fellerman from the defendant were deposited in his account and used by him to pay obligations of the firm.

The COURT: I do not recall that there is any contradiction of such evidence. It is for the jury to say.

Defendant excepts.

Mr. GANESBURG: I ask your Honor to charge the jury that there is no evidence in the case that the debts so paid by him were not legitimate debts of the firm.

The COURT: I do not recall any such evidence. It is for the jury to say. I do not charge the jury that there was no evidence in the case; I do not recall any; I think there is not, but it is for the jury to say; it — not for me to tell them.

Defendants excepts.

Mr. GANESBURG: I ask your Honor to charge the jury that it was not fraudulent for Fellerman to use the money borrowed from the defendant to pay legitimate debts, although the creditors so paid obtained thereby a preference over other creditors.

The COURT: I decline to so charge; it is a question for the jury; it may be and may not be.

Defendant excepts.

273 Mr. GANESBURG: I ask your Honor to charge the jury that the preferring of one creditor over other creditors of the same class by payment of his debt, is not a fraud under the Bankruptcy Act.

The COURT: I decline to so charge, and leave that question for the jury.

Defendant excepts.

The COURT: There is no occasion for you to give all these requests to charge; the only result is to confuse the record and make it longer. So many requests to charge do not tend to help at all, in actually ascertaining the truth in a case. It is very tiresome.

Mr. GANESBURG: I except to your Honor's statement that the object of these requests to charge is to lay a trap for the jury, and state that these are made in good faith. I have only a few more, and shall be glad to read them to your Honor.

Mr. GANESBURG: That it was not fraudulent for the defendant to advance moneys to Fellerman to be used by him in paying legitimate debts, although by receiving such payments, these creditors thereby received a preference over other creditors.

The COURT: I decline to so charge.

Exception.

Mr. GANESBURG: I ask your Honor to charge the jury that there is no proof or evidence of any guarantee under the terms of which the defendant could now recover the money loaned to A. Fellerman & Son.

The COURT: I decline to so charge. It is for the jury to say whether there is proof.

Defendant excepts.

Mr. GANESBURG: I ask your Honor to charge that if the jury do not believe the testimony of Fellerman that the defendant proposed to him to take stock in its company for its equity, which he
274 could transfer to his wife, or daughter, or any one else, then the verdict must be for the defendant.

The COURT: I refuse so to charge.

Defendant excepts.

Mr. GANESBURG: I ask your Honor to charge the jury that there is no proof in the case that the defendant and the bankrupt had any secret understanding and agreement with reference to the failure of the firm of A. Fellerman & Son.

The COURT: I decline to so charge. It is for the jury to say whether there was or not.

Defendant excepts.

Mr. GANESBURG: I ask your Honor to charge that the Court's refusal to dismiss does not indicate that the plaintiff had made out a cause of action, but it is merely the opinion of the Court that a question of fact is presented for the consideration of the jury.

The COURT: Certainly; I so charge. I charge the jury that they are to give no weight to my refusal to dismiss the complaint. It simply means that the question is one for the jury to decide; it does not prejudice the defendant at all.

Mr. GANESBURG: I ask your Honor to charge the jury that if the verdict in this action is for the defendant, the trustee may obtain an accounting as to the surplus over and above the loans actually made, in which action the propriety of the charges for commissions and expenses may be investigated and determined.

The COURT: I refuse to so charge.

Defendant excepts.

Mr. GANESBURG: I ask your Honor to charge the jury that if the jury believe that the evidence is evenly balanced on the question of fraud on the part of the defendant, the verdict must be for the defendant.

275 The COURT: I so charge. The plaintiff must establish his case by a preponderance of the evidence.

Mr. ELKUS: I want to say one word. You did not say anything to the jury about the Schiller guarantee. I simply want to ask your

Honor to charge that the jury may take that into consideration in judging of the *bona fides* of the transaction.

The COURT: I so charge.

Mr. GANESBURG: I ask your Honor to charge that there is no evidence in the case as to the terms of any such guarantee or what the guarantee contained.

The COURT: I think so, but it is for the jury to say.

Mr. ELKUS: I ask your Honor to charge the jury that the defendant on the stand conceded that the guarantee was last in his possession, and although required to produce it, did not do so.

The COURT: I think he did on the stand concede that it was last in his possession, but I do not recall whether you asked him to produce to it.

Mr. ELKUS: I ask that you- Honor leave it to the jury.

Mr. GANESBURG: I except to your Honor's charge wherein you said you left the question of the asking for the production of the guarantee to the jury, and ask your Honor to charge the jury that there was no request made for the production of the guarantee; that Mr. Levison testified he did not recall and doesn't know what became of any such guarantee, if he received it.

The COURT: It is for the jury to say what the evidence was on the subject.

Mr. ELKUS: Will your Honor permit the jury to take the exhibits and the testimony of Mr. Levison which he signed and the statements from the Commercial Agenices, or the copy of them which we agreed to take in place of the original? The original con-
276 tract I should like to have submitted to the jury and a copy furnished to us by the defendant. Also, if the jury desire, the pay-slips signed by Mr. Nathan.

The papers above referred to are handed to the jury.

Mr. ELKUS: We say that we are entitled to $4,767.76, with interest from September 27th, 1905.

Jury retire at 11:30 A. M.

Jury return at 12:30 with a verdict for the plaintiff.

DEFENDANT'S COUNSEL: I ask to set aside the verdict as against the evidence, against the weight of the evidence, contrary to law and excessive, and move for a new trial upon these grounds.

Motion denied. Exception.

On motion of defendant's counsel a stay of 60 days, and 60 days to make a case, was granted.

The National Discount Company.

Name A. Fellerman & Son.

Date.	Name.	City.	Terms.	Date Due.	Amount Gross.	Amount Net.	
1905							
July 20	Gimbel Bros.	Phila., Pa.	10/10	Sept. 9/11	10.92	9.83	
" 35	" "	Milwaukee, Wis.	10/10	" 9/11	10.92	9.83	
Aug. 4	" "	" "	"	" "	240.35	216.31	
June 20	Olds Wortman & King	Portland, Ore.	2/30 x 30 or 4/30	8/20	166.50	159.84	
" 30	Robt. Wallace	San Francisco, Cal.	2/30	30 x 8/20	124.50	122.01	
" 11	" "	" "	"	" 8/11	259.00	253.82	
July 28	Fitzgerald & Locke	Dodge City, Kas.	2/10 30 or 3/10	9/ 8	110.50	107.19	Pd
" 28	" "	" "	"	" "	2.50	2.42	Pd
May 16	Geo. E. Plummer & Co. (Geo. F. Quigley & Co.)	Boston, Mass.	7/10	60 x 7/26	62.00	57.66	
June 7	" "	" "	"	8/17	11.50	10.69	Pd
" 16	" "	" "	"	8/26	61.25	56.96	
" 19	" "	" "	"	8/29	24.75	23.02	
May 17	Globe Supply Co.	" "	2/10	30 6/27	30.00	29.40	C
June 1	" "	" "	"	" 7/11	16.50	16.17	C
" 13	" "	" "	"	" 7/23	15.00	14.70	C
July 22	Kerr Dept. Store Co.	Minneapolis, Minn.	2/60	" 9/22	277.50	271.95	

June 8	A. Mark's Sons	Amsterdam, N. Y.	2/10	60	8/18	14.30	14.01	Pd	C
" 16	" " "	" " "	"	"	8/26	20.35	19.94	Pd	C
" 2	M. Phillipsborn Co	Denver, Col.	7/10	30	7/12	8.00	7.44		
" 16	" " "	" " "	"	"	7/26	8.80	8.18		
" 8	Chase D. G. House	Jamestown, N. D.	Net 60 days.		8/ 8	168.34	168.34		
July 22	" " "	" " "	2/30—30 or 4/10 Aug. 1		8/11	299.00	287.04		
" 26	" " "	" " "	"	"	"	18.50	17.76		
June 26	Jacob Perl	Seattle, Wash.	2/60		8/26	12.50	12.25		
Aug. 8	Hugo Stein Cloak Co	Toledo, O.	2/10–30 or 3/10		9/18	60.50	58.68		
July 25	Pearce Cloak Co	Minneapolis, Minn	7/10	30 x	9/ 5	37.00	34.41		C
" 28	" " "	" " "	"	"	"	195.00	181.35		C
						2265.98	2171.20		

Date.	Name.	Name.	City.	Terms.	Date due.	Amount. Gross.	Net.	
Aug. 8—	Rosenbaum & Co		Mt. Vernon, Ind	3/10	—8/18—	70.50—	68.38	Pd
June 13—	Horne Supply Co		St. Louis, Mo	Net cash as 8/13	—8/13—	49.50—	49.50	
Aug. 2—	"	"	"	"	"	177.00—	177.00	
June 20—	Whitehouse & Co		Spokane, Wash.	5/60	—8/20—	145.50—	138.22	
Apr. 18—	H. H. Porter & Co		Denver, Colo.	3/10 30	—6/18—	84.00—	81.48	C
July 6—	N. B. Stevens		Albany, Ore.	2/30 x 30 or 4/10 as 8/15	—9/ 6—	278.00—	266.88	
June 7—	A. W. Lucas Co		Bismark, N. D.	Net Aug. 1	—8/ 1—	55.33—	55.33	
" 8—	"	"	"	"	"	145.84—	145.84	
July 15—	"	"	"	2/30 x 30 4/10 as Aug. 1	—9/15—	588.75—	565.20	
" 15—	"	"	"	"	"	117.00—	112.32	
" 6—	Chas. A. Stevens & Bros.		Chicago, Ill.	3/10 30	—8/16—	10.50—	10.18	
" 29—	"	"	"	" "	—9/ 9—	126.00—	122.22	
Aug. 4—	"	"	"	" "	—9/14—	8.07—	7.83	
" 7—	"	"	"	" "	—9/17—	8.07—	7.83	

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July 7—	Wm. Walker		Seattle, Wash.	2/30 30	—9/ 7—	43.50—	42.63	Pd
" 24—	Ben Steinberg		Minneapolis, Minn.	3/10 30 as Aug. 15	—8/15—	113.00—	109.61	C

Aug. 10	Sam Goodman	Terre Haute, Ind.	3/10							
July 26	Silversmith & Hiller	Denver, Colo.	2/60 as							
Aug. 9	The Newman D. G. Co.	Arkansas City, Kas.	2/10 x 30	Sept.	11	9/ 1	166.25	162.92		C
" 9	T. S. Martin & Co.	Sioux City, Ia.	or 3/10			9/19	11.00	10.67		
July 14	The Willson Co.	Bozeman, Mont.	3/10			8/29	99.00	96.03		
Aug. 4	L. Diamond & Sons, c/o B. Sommers & So.	Boston, Mass.	2/30 x 30			9/14	42.00	41.16		
" 9	" " "	" "	8/10			8/14	176.00	161.92	Pd	C
Apr. 5	Cæser Misch. Inc.	Providence, R. I.	"			8/19	103.50	95.22	Pd	C
" 11	" " "	" "	7/10-60			6/15	11.00	10.23		C
" 18	" " "	" "	"			6/21	14.50	13.48		C
" 19	" " "	" "	"			6/28	12.50	11.62		C
" 24	" " "	" "	"			6/29	47.25	43.94		C
						7/ 4	7.50	6.97		C
280							2,766.06	2,667.96		
May 13	Cæser Misch. Inc.	Providence, R. I.	7/10	60 x		7/23	9.35	8.70		C
" 26	" "	" "	"			8/ 6	25.50	23.71		C
" "	"	" "	"			8/ 6	25.50	23.71		C
" "	"	" "	"			" "	17.50	16.27		C
" "	"	" "	"			" "	25.50	23.71		C
" "	"	" "	"			" "	37.50	34.87		C
" 27	"	" "	"			" "	25.50	23.71		C
June 2	"	" "	"			8/ 7	17.50	16.27		C
" 8	"	" "	"			8/12	5.50	5.11		C
						8/18	11.00	10.23		C
							200.35	186.29		

281 PLAINTIFF'S EXHIBIT No. 9, DEC. 8, 1908.

WOODBRIDGE BUILDING, 100 WILLIAM STREET,
NEW YORK, *February 21st*, 1907.

Robert Van Iderstine, Counselor at Law.

Telephone 5397 John.

Mr. J. N. Rosenberg, c/o James, Schell & Elkus, 346 Broadway, N. Y. City.

DEAR SIR: I am in receipt of your favor of the 19th inst. enclosing check of the National Discount Company for $767.33. I have noted your comments on the same and that you will make a demand for a full accounting from the National Discount Company.

In accordance with your advice I shall deposit this check in my account as Trustee in the Manhattan Trust Company.

I have drawn and delivered to Mr. Werblein a check to the order of Samuel Gordon for $500, "in full of all claims." Mr. Werblein had served the order upon me requiring this payment and I understood him to represent Mr. Gordon in this matter, as he had been in communication with you upon the same subject.

Yours very truly,

ROBERT VAN IDERSTINE.

R/M.

282 EXHIBIT No. 10, DEC. 8, 1908.

This agreement, made this 15th day of August, 1905, between The National Discount Co., doing business in the City of New York, hereinafter designated as Banker, and S. Fellerman & S-n, hereinafter designated as Customer, witnesseth:

Whereas, the said Customer is desirous of realizing cash on all accounts created by the sale of goods ordered and shipped to their customers.

Now, therefore, in consideration of the covenants and agreements to be kept and performed by the respective parties hereto, and of one dollar mutually in hand paid by one party to the other, this agreement witnesseth;

The Banker agrees to secure funds and advance same to the Customer from time to time Seventy-five per centum of the net face value of such accounts as may be accepted by the Banker upon the following terms and conditions:

First. The Customer may submit all their orders to the Banker for approval of Credit.

Second. The Customer shall deliver to the Banker a correct original and duplicate invoice for goods actually sold and delivered, with original shipping receipts or bills of lading, and an assignment of the account upon the form attached hereto, and made a part of this agreement.

The Banker reserves the right to cancel its approval of any order, or part thereof.

Should the Banker, for good and sufficient reasons, disapprove of an order, the Customer may fill said order, but the account must be assigned as other accounts, and is to be held as general
283 security for all obligations of the Customer to the Banker, subject to all the conditions contained in this agreement.

Third. It is understood and agreed that the Banker in no wise guarantees payment of any account.

Fourth. It is further agreed that the Banker will credit the Customer with all sums of money realized from the collection of accounts and that said accounts transferred and assigned to the Banker as aforesaid, shall be held as general security for any and all advances, claims debts, dues and demands of the said Customer, due or to become due or that may hereafter be contracted with the said Banker, with full right and power to said Banker to demand such additional security as the Banker may deem necessary; the said Customer to remain liable to the Banker for any deficiency resulting from said accounts.

Fifth. The Customer authorizes and empowers the Banker to endorse the name of the Customer on any and all checks, vouchers, notes, drafts, or other negotiable instruments or commercial paper, which may be payable to the order of the Customer, or endorsed over to the order of the Customer, and received as remittance for accounts assigned and transferred to the Banker as aforesaid; to collect and receive all moneys, to give receipts therefor, and to sue for and collect said accounts in its own name, or in the name of the customer, or otherwise, it being distinctly understood that all and every expense incurred in the collection of accounts is to be charged to and paid by the Customer.

Sixth. The Customer agrees to pay to the Banker in cash
284 or allow the Banker, if it so elects, to retain from any moneys collected or received upon the accounts of the Customer, a commission of 5 per centum on the gross amount of accounts of the Customer to reimburse the Banker for services rendered or to be rendered in the collection of the accounts, in assisting in extending credit, securing references and reports and generally to assist the Customer with his credit department. The customer also agrees to reimburse the Banker for such outlays as exchange on checks and postage.

Seventh. The Banker shall further be entitled to charge interest at the rate of six (6%) per centum per annum on moneys advanced by it to the said Customer.

Eighth. Should any moneys on any account on which advances have been made by the Banker be collected by the Customer, in whole or in part, all such remittances or collections shall be considered as and be received by the Customer in trust for the Banker, and the identical checks or moneys constituting such remittances shall be immediately handed over to the Banker.

Ninth. The Customer hereby guarantees the correctness and bona fides of all accounts assigned, and the payment of same, and

that all merchandise sold, shipped and delivered and constituting such accounts will be packed under personal supervision and legibly marked with the address of the consignee and delivered to common carriers against their receipts of bills of lading to be forwarded to their respective destinations.

Tenth. Should any debtor from whom an account is owing make a general assignment, or any transfer of his, her, its or their property, or should a Judgment be taken against such debtor, or
285 should proceedings in bankruptcy be instituted against such debtor, or should any legal proce-ding be instituted against such debtor or any such debtor become insolvent, as construed by the Bankruptcy Laws of 1898 and 1903, or should any account become due and owing, according to the terms of invoice and not be paid, then the Customer, upon the demand of the Banker, shall pay to the Banker in cash, or allow the Banker, if it so elects to deduct from any balance, which it may have on hand, or out of any sum which it may thereafter have on hand to the credit of the Customer, any advances made on such account, together with the charges of the Banker specified in the fifth, sixth and seventh clauses of this agreement.

Should the Customer allow any claim or deduction on any account assigned to the Banker, notice thereof must immediately be given by the Customer to the Banker, and thereupon the Customer shall pay in cash or allow the Banker if it so elects, to deduct from any balance, which it may have on hand, or out of any sum which it may thereafter have on hand to the credit of the Customer for the claim allowed.

Should any goods be returned to the Customer on any account assigned to the Banker or information received by the Customer of such return, the Customer must immediately give notice to the Banker, and it shall be optional with the Banker either to retain its title to the merchandise returned or to surrender the same upon receiving payment therefor in cash, or at the further option of the Banker to deduct the value of the goods returned from any balance which it may have on hand to the credit of the Customer.

The Customer agrees that any account, transferred to the Banker will have this transfer properly entered in his ledger stating
286 that this account is the property of The National Discount Company.

Eleventh. The Banker or its representative shall have the privilege of investigating the bona fides of all accounts upon which advances have been made to the Customer.

Twelfth. The Customer agrees not to procure advances on any accounts from any source other than the Banker during the continuance of this agreement.

Thirteenth. This agreement shall be a continuing one, subject to a discontinuance upon thirty (30) days, notice in writing by either party to the other, the Customer, however, reserving the right to discontinue this agreement by settling his account with the Banker in full.

Fourteenth. The foregoing statements, representations and cove-

nants are made by the Customer for the express purpose of inducing the said Banker to enter into said agreement and to make advances to said Customer on accounts as hereinbefore set forth.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

A. FELLERMAN & SON.

For Value Received, do hereby sell, assign, transfer and set over to The National Discount Company its successors and assigns, the foregoing account, all right, title and interest therein, and all right, title and interest in and to the mechandise constituting the same, and all right, title and interest in and to any of the merchandise therein described that may be returned, and hereby guarantee that said account is just and true, that no payment has been made
287 on said account, and that there are no defenses or counterclaims thereto, and that the terms of credit are as specified, and hereby guarantee payment of said account at maturity, and that the account so assigned is a bona fide and correct account of goods actually sold and delivered and accepted.

And hereby constitute and appoint, and by these presents do constitute and appoint The National Discount Company our true and lawful attorney, irrevocable for us and in our name and stead, but to its own use and benefit, to sell, assign, transfer or set over, demand, compromise or discharge, sue for and collect the foregoing account, giving and granting to the said The National Discount Company or its substitute, full power and authority to do and perform all and every act and thing wheresoever necessary or proper to be done in the premises, hereby ratifying and confirming all that our said attorney, or its substitutes, shall lawfully do or cause to be done by virtue hereof.

Witness our hands and seal this 15th day of August, 1905.

A. FELLERMAN & SON.

Brad. 50/75 fair.

Dun. 50/75 good.

The National Discount Company.

Name, A. Fellerman & Son. Date, Aug. 18, 1903.

Date.	Name.	City.	Terms.	Due.	Amount. Gross.	Net.	
Aug. 16	H. D. Butterfield	Mitchell, S. D.	3/10	8/86	22.00	21.34	
	Boettcher Lilland Co	Oklahoma City, O. T.	2/10 30 x 3/10	9/26	44.00	42.68	
	Martin D. G. Co	Cedar Rapids, Ia	3/10	8/26	66.	64.02	
9	Louis Stecher & Co	Phila., Pa.	2/10	8/19	90.	88.20	Pd
15	" " "	" " "	"	8/25	221.	216.58	
	Pearce Cloak Co	Minn., Minn	7/10	30 x 9/25	196.	182.28	
	" " "	" " "	2/10	30x	99.	97.02	
	Chas. E. Lynch	Springfield, Mass.	3/10	8/25	44.	42.68	retd 8/17
	Rosenbaum Bros.	Mt. Vernon, Ind	"	"	85.50	82.93	
	Lynt Murphy	Pawtucket, R. I.	"	"	99.	96.03	
	" " "	" " "	5/10	"	34.50	32.77	
	Carson Pirie Scott Co	Chicago, Ill.	2/10 30				
			3/10	9/25	121.	117.37	
16	W. A. Wieboldt & Co	" " "	3/10	8/26	44.	42.68	
	Cæser Misch, Inc	City	7/10, 60				
			8/10	10/26	66.	60.72	C
	" "	Holyoke, Mass.	"	" "	55.	50.60	
	" "	Hartford, Conn.	"	" "	55.50	51.06	C
	" "	Worcester, Mass.	"	" "	55.	50.60	
	" "	Prov., R. I.	"	" "	21.	111.32	C

	15—Gimbel Bros.	—Phila., Pa.	—		10/10	— 8/25	— 305.90	— 275.31		
	17—Chas. A. Stevens & Bro.	—Chicago, Ill.	—	3/10	30	— 9/27	— 336.	— 325.92	C	
	14—Young Bros.	—Des Moines, Ia.	—		3/10	— 8/24	— 121.	— 117.37		
July	13—Stix Baer & Fuller	—St. Louis, Mo.	—		2/10	— 7/23	— 10.	— 9.80		
Aug.	11— " " "	— " "	—		"	— 8/22	— 4.10	— 4.02		
	14— " " "	— " "	—		"	— 8/24	— 200.	— 196.		
							2,495.50	—2,3— .30		

14—695

289 PLAINTIFF'S EXHIBIT No. 13, DEC. 9, '08.

Telephone Connection.

B. Levison, Jr., President. J. Lewis D., Secretary.

The National Discount Co. (Incorporated),
374 Broadway.

NEW YORK, *March 13th*, 1907.

Copy received
Referred to
March 14, 1907—9.19 A. M.
James Schell & Elkus, 50 Pine Street, New York.

Messrs. James, Schell & Elkus, 50 Pine Street, New York City.

DEAR SIRS: (In re A. Fellerman & Son.)
We beg to state that we have communicated with Mr. Ralph Nathan this day, and he tells us that he has no papers or correspondence in connection with this case. All monies that were received were turned over to us and the other accounts he has neither heard from them nor anything else, and he deems that you had better communicate with the debtors.

Respectfully yours,

NATIONAL DISCOUNT COMPANY.
B. LEVISON, JR., *President.*

BL/MW.

290 PLAINTIFF'S EXHIBIT No. 14, DEC. 10, '08.

United States District Court, Southern District of New York.

In the Matter of A. FELLERMAN & SON, Bankrupt.

Examination of BENO LEVISON, at the request of the Trustee, at the office of the National Discount Company, March 29th, 1907.

Present:

Mr. Levison.
Mr. Gainsburg, of counsel for National Discount Company.
Mr. Rosenberg, of counsel for the Trustee.

By Mr. ROSENBERG:

Q. Mr. Levison, you are president of the National Discount Company?
A. I am.
Q. Which is a corporation organized under the laws of the State of Maine?
A. Yes.

Q. And you had transactions with A. Fellerman & Son?
A. We did.
Q. Can you tell me when you first met either member of the firm?
A. I can't tell exact date—I think four or five days before contract was signed, the contract was signed on the 15th day of August, 1905.
291 Q. At that time contract was signed?
A. That time? I don't remember exactly—he came three or four days before.
Q. So around the 10th of August was the first time you ever met him?
A. First time.
Q. Was that the elder Fellerman?
A. I don't know whether it was.
Q. About twenty-three?
A. Older man that that.
Q. Did he have a grey beard?
A. That I don't remember.
Q. Was it Abraham or Isidor—I want to identify the man?

Mr. GAINSBURG: He said he was over twenty-three.

Q. On the 15th this contract which you have produced was signed?
A. Yes, sir.
Q. Now that covered the entire agreement between you and Mr. Fellerman?
A. Yes, sir.
Q. Pursuant to which you were entitled to receive 5% commission on the face amount of the accounts?
A. Yes.
Q. And advance 75% of the gross face amount?
A. Net amount.
Q. And charge interest at the rate of 6% per *per* annum on the amount advanced?
A. Yes.
Q. On that day there was an advancement made by you?
A. No, sir.
Q. On the 15th?
A. Yes, sir.
Q. When was the first advancement made?
A. On the 15th.
Q. The first one was made?
A. Yes.
Q. The first advancement was made on the 15th?
A. Looks to me that way. The first advancement was made on the 15th.
Q. That was this check of $3,000?
A. Yes, sir.
Q. When he assigned this account he brought in those accounts?

A. It took several days to look up the proposition and
292 those accounts—we gave him $3,000.00, which was on the 15th, on the 18th the account was made up. The accounts were brought in on the 15th and one loan was made on the 15th.

Q. That was $3,000?

A. $3,000.

Q. Look at the back of that—who was J. J. Debold?

A. My former secretary.

Q. Why is his endorsement there?

A. I presume this man wanted currency and Mr. Debold put his signature there.

Q. This check has been cashed?

A. It looks that way.

Q. Do you remember whether Mr. Fellerman asked you to have his signature endorsed that way so that he could get the cash?

A. I don't remember that.

Q. What other advances were made by you?

A. Then the other advance was made by us, $1,125, on the 18th.

Q. Is that all, or are there other advances?

A. That is all—two advances.

Q. The advance of $1,125 was advanced by this receipt which I show you?

A. Yes, sir.

Q. The check is marked "Exhibit 8, February 7th, 1907. U. S. D. C."; the receipt reads as follows: "New York, August 18th, 1905—Received from the National Discount Company, $1,125.00."

A. Fellerman & Son.

Q. Now let me show you this receipt, being receipt of $267.73—when did he get that?

A. On the 18th.

Q. Which did he get first, the $1,125 or $267?

A. That I can't tell.

Q. Won't your books show?

A. There they are.

Q. Which one is entered first?

A. First? $267.73.

Q. Did he see you that day?

A. I don't remember that.

293 Q. Were those advances made in cash or by check?

A. Cash.

Q. No check was received from you for these two accounts?

A. Cash.

Q. Are those all the moneys that you loaned to A. Fellerman & Son?

A. That's all.

Q. Was Mr. Fellerman in to see you personally again on that day?

A. Yes.

Q. And brought accounts on the 18th?

A. Yes.

Q. And upon that the second advances were made?
A. Yes.
Q. On the 15th he brought one batch of accounts and you gave him $3,000?
A. Yes, sir.
Q. And on the 18th he brought one more batch?
A. He brought one batch only and got these two sums.
Q. At different times?
A. Got it on the 18th, this $261.62 I see is our commission.
Q. Did you immediately advance $267.73, or was that commission that he immediately repaid?
A. It was an advance, and he might have paid the commission—I did not do that transaction.
Q. On August 15th he got $3,000——
A. Yes.
Q. On that day, the 15th, did he pay any commission?
A. No.
Q. When did he pay the first commission?
A. On the 18th.
Q. On the 18th he got $1,125, and $267.73 in cash?
A. Yes, that's right.
Q. On August 15th he got $3,000, and on that you were entitled to a commission of $261.62, being 5% of the gross amount of $5,232.39 assigned on that day?
A. Yes.
Q. He didn't pay you commission of that day, August 15/05?
A. No.
Q. On the 18th he came in with some accounts——
A. Yes.
Q. And wanted a further loan, and *he* got $1,125 and
294 $267.73, as an actual loan, and he owed you this $261.62, which he paid you?
A. Yes, sir.
Q. Then, as a matter of actual fact, all your actual advances were $4,125?
A. $4,125 and $267.73.
Q. The total gross amount of the total accounts assigned was how much?
A. $7,727.89.
Q. And the total commission charged was how much?
A. 5%.
Q. Amounting to how much?
A. $261.62 and $124.78, amounting to $386.40.
Q. Mr. Fellerman did not actually pay you $267.73 on the 18th or any time, did he—that was simply a charge that you made——
A. He received $267.73, and he paid us our commission, $261.73.
Q. In cash?
A. Yes, and he paid us $261.62.
Q. So that the total advances which you made were $4,392.73? August 15/05, $3,000; August 18, $1,125; August 18, $267.73?
A. That's right.

Q. Did you actually hand him that $267.73 or did you simply take that receipt as a matter of bookkeeping?

A. Sure, no question about that—he got the money.

Q. And immediately he returned $261.62?

A. I take it for granted that Mr. Debold asked him for our commission and he paid it.

Q. Irrespective of the manner of bookkeeping of the transaction, the actual money received by A. Fellerman & Son was $4,392.73?

A. Yes.

Q. Received and retained?

A. Yes.

Q. And the actual total commissions received by you $386.40?

A. Yes.

Q. And the actual total gross accounts assigned were $7,727.89?

A. Yes.

Q. What was the actual gross amount collected by the National Discount Company? Out of the $7,727.89?

A. $5,612.71.

Q. And what was the amount of the check which you
295 turned over to the Trustee in Bankruptcy?

A. $767.33.

Q. So that the actual surplus in money collected by you over and above was $4,181.61?

A. That's right. (Do not understand this question).

Q. So that, including your expenses of collection of one kind and another, and your commission, charges, attorneys' fees and sundries, the total expense to A. Fellerman & Son for getting this loan of $4,293.72 was $761.43?

A. Yes.

Comm.	386.40
Att'y	344.77
Int.	18.17
Sundy.	12.09
	761.43

Q. These accounts that were transferred to you, what were the terms of credit on most of them, do you recall?

A. I don't recall.

Q. There were no very high price accounts.

A. No, sir.

Q. Miscellaneous lot of accounts?

A. Miscellaneous lot of accounts.

Q. Can you tell how many days had passed by before you collected $4,131—how long was it before that money came in to you?

A. September 27th.

Q. By September 27th how much had you collected?

A. $4,241.42.

Q. What was the total interest charged on the transaction?

A. $12.09.

Q. How much did you pay for attorneys' fees?
A. $344.77.
Q. The total charges for commissions, interest, postage and sundries, and all your charges other than attorneys' fees, are how much?
A. $416.66.
Q. Your total actual advances to A. Fellerman & Son were $4,392.73? Am I right?
A. Yes. The total amount advanced to Fellerman & Son
296 was $4,392.73, made up of the $4,006.33 and our commission, which he paid to us, amounting to $386.40. The total expense for the collection of these accounts, including attorneys' fees, postage, interest and sundries, consist- of the following items: $386.40, commissions; $18.17, postage, etc.; $12.09, interest; $344.77, attorneys' fees; making a total of $751.43. In addition to that we paid the Receiver of Fellerman $767.33, making a total outlay of cash for advances to Fellerman, payment to Receiver and charges, together with attorneys' fees, etc., of $5,535.09, we collected between August 18, 1905, and March 26th, 1906, $5,612.71. The difference between the amount collected and the amount paid out is $77.62; that we denominated over-payments being moneys sent to us on accounts which had not been transferred to us. We received notice from Mr. Stich and his attorneys that these accounts had been assigned to him; we paid the $77.62 as follows: $59.69 and $17.93 by two checks to Epstein Bros., who were attorneys for Mr. Stich.
Q. Referring to the above, when were the commissions of $386.40 paid?
A. The total commissions of $386.40 were paid on August 18th.
Q. In cash or by check?
A. Cash.
Q. What was the gross amount of the accounts in the second batch—that is, of August 18th?
A. $2,495.50.
Q. What advances were they entitled to at 75%?
A. We charged them on the gross amount.
Q. The gross amount of accounts transferred on August 18th was how much?
A. $2,495.50.
Q. The net amount, $2,379.30—what advance were they entitled to at 75%?
A. $1,765.
Q. They actually received only $1,125?
A. Yes.
Q. Less than they were entitled to under the contract?
A. Yes.
297 Q. You were not satisfied with the accounts they gave?
A. Good lawyer.
Q. You got $386.40 in commissions—how did you get that?
A. By receiving it in cash from the actual advances made to Fellerman—in other words, on the 18th day of August we paid him $1,125 and $267.73, and he paid in cash; the other charge of

$124.78, we received it from the amount of advances made him on that day—in other words, the amount advanced on that day was really $1,125, and he paid us $124.78, leaving the amount $1,000.22.

Q. On August 15th they got $3,000, of which they returned nothing to you for commissions?

A. No.

Q. That's right, isn't it?

A. Yes.

Q. On August 18th they actually came and took away with them how much?

A. $1,006.33. Paid us

$1,125	$3,267.73
124.78	261.62
$1,000.22	$3,006.11
	3,000.00
	$ 6.11

Q. So that the actual amount which the Fellermans actually received from you and kept was $4,006.33?

A. Right.

Q. The total amount which you actually collected was $5,612.71?

A. Yes.

Q. The difference between $5,612.71 and $4,006.33 is how much?

A. $1,606.38.

Q. That $1,606.38 is made up how?

A. Of attorneys' fees, $344.77; postage and sundries, $18.17; interest, $12.09; commissions, $386.40; paid to Receiver, $767.33; over-payments and returned to Epstein Bros., $77.62.

Q. Total, how much?

A. $1,606.38.

298 Q. Excluding the attorneys' fees which you paid, excluding the over-payments of $77.62, how much were your total charges for interest, commissions and postage on this transaction?

A. $416.66.

Q. Will you please tell me by what date you had received $4,006.33?

A. September 27th.

Q. By September 27th you had $4,241.42, did you not?

A. Yes.

Q. By October 14th, 1905, you had received $4,851.51, had you not?

A. Correct.

Q. You charged your commission of 5% on the gross amount of the transfers on August 18th?

A. Yes.

Q. Even though you did not advance 75%?

A. Yes.

Q. And you claim you are entitled to that?
A. Yes.
Q. When did you pay the attorneys' fees, and to whom did you pay them?
A. Ralph Nathan.
Q. Dates, please.
A. $311.99 on 11/20/05; $32.78 on March 26, 1906.
Q. Those payments were made for what services?
A. For collections.
Q. Did he render a bill?
A. He did.
Q. Will you please let me see it?
A. Yes, sir.
Q. They were made as a basis of collection charge of 10% of the amounts collected on various accounts?
A. Yes.
Q. The amounts collected were $3,119.96?
A. Yes.
Q. Do you know whether Mr. Nathan ever brought any suits for collection of any accounts?
A. I don't know.
Q. Did you immediately, after the accounts were transferred to you, send out notices to all debtors?
A. Yes.
Q. Did you send out notices to any of the debtors before the failure?
A. Yes, sir. We sent them out.
299 Q. As soon as you received the accounts you notified customers?
A. Yes.
Q. Is it not a fact that all Mr. Nathan did was to write collection letters to collect these accounts?
A. I don't know that.
Q. When did you first retain Mr. Nathan in this matter?
A. I don't remember; must have been after the failure.
Q. Has any of these customers, whose accounts you place with Mr. Nathan, refused to pay you?
A. We had not heard from them.
Q. You wrote and they did not reply, and you retained Mr. Nathan?
A. Yes, sir.
Q. All of them?
A. As far as I know.
Q. Did you make any investigation of the financial condition of the Fellermans?
A. I did, most assuredly.
Q. What investigation did you make?
A. Dun's and Bradstreet.
Q. Did you ask them for a statement?
A. I don't recall.
Q. Did you receive any statement from them?

A. I don't remember.
Q. What questions did you ask them?
A. I might have asked them whether they were solvent.
Q. How much did he tell you he was worth?
A. $50,000 or $60,000.
Q. Did you ask him whether he was transferring all his accounts to you?
A. I don't remember that.
Q. Did he want more than $3,000 on the 15th of August?
A. I don't remember.
Q. Did you tell him that if he wanted more money that he would have to bring you more accounts?
A. No, sir.
Q. Did he tell you that he was pressed for payment of his debts by his customers?
A. I do not know, sir.
Q. Did you make any inquiries to find out?
A. No, sir; not as I remember.
300 Q. You looked up his rating?
A. Yes. $50,000 to $75,000, good, in Dun's; $50,000 to $75,000, fair, in Bradstreet's.
Q. Had fair credit?
A. Good credit.
Q. You asked him whether his present condition was as good as at the time of the statement?
A. He said it was.
Q. What further inquiry did you make?
A. I don't recall.
Q. Did you ask him why it was necessary for him to cash his accounts?
A. None of my business.
Q. Did you ask him whether his bills were past due?
A. I don't remember.
Q. Did you ask him whether his creditors had brought suit?
A. I don't remember.
Q. Did you ask him whether the bank had stopped giving credit?
A. I don't remember.
Q. Is 5% your usual commission charge?
A. It is on clothing accounts.
Q. Did you ask what his profit on sales was?
A. I don't remember.
Q. Have you in a great many other cases charged 5%—as much as that?
A. Yes, sir.
Q. Did it strike you as anything unusual that instead of check he wanted cash on the 18th of August?
A. No.
Q. Is that frequent?
A. Very often.
Q. Did he tell you why he wanted the cash?

A. I don't remember.
Q. Did you ask him whether he kept a bank account?
A. I don't remember.
Q. Did you personally hand him any of the cash?
A. That, I don't remember, either.
Q. Either you handed it to him or you instructed Mr. DeBold to hand it?
A. One or the other did.
Q. Isn't it your ordinary course to give checks?
A. We draw a certain amount of cash every morning—if we have cash——

Q. Wasn't it a fact that he wanted cash and that you
301 thought he might be in financial difficulty?

A. No, sir.

Q. What in short, was that first conversation when he came in to see you?
A. He came in to see me and wanted us to finance his accounts—he told us he did $100,000 of business—I took his name and told him I would investigate—he came in two or three times, and on the 15th I told him that as they were clothing or woman wear manufacturers my charge would be 5%.
Q. Were most of those accounts 10 or 30 days?
A. I don't remember.
Q. Just look at the accounts?
A. Here is one July, which was due on the 9th of October—4 months accounts—on an average, three and four months accounts.
Q. Were there any further conversations on the 18th as to Mr. Fellerman's financial condition?
A. Not that I recall.
Q. Or on the 15th?
A. Only those I have stated.
Q. Those conversations took place then?
A. Yes.
Q. It was then he told you of his financial condition?
A. Yes.
Q. Did you ask him what merchandise accounts he owed; whether he owed the American Woolen Company?
A. I don't remember the questions I asked him; it is customary for me to ask questions, but I don't remember now what questions I asked him.
Q. Your getting $100,000 would have meant $5,000 on advance, $75,000 and interest?
A. Yes, sir.
Q. Didn't it strike you that if this man was actually worth from $50,000 to $75,000 that he didn't need to cash his accounts?
A. No, sir—we have men come here——

Q. Have you ever had an account from a man worth as
302 much as $50,000, where you got 5% and the man didn't fail?

A. A great many clients—all the way worth from $50,000 to $75,000 who did not fail.

Q. Did you ask to inspect his books?
A. I don't remember that.
Q. You have never inspected books, have you, before you went into these transactions?
A. Sometimes I have.
Q. You have a great many of these transactions—that is the regular business of the National Discount Company—and before you advance on accounts do you ever have their books examined or examine them yourself?
A. No, sir.
Q. You rely on the collateral?
A. Exactly.
Q. Do you know whether or not Mr. DeBold went right over to the bank when the $3,000 check was retained so that Fellerman could cash it at once?
A. I don't know.
Q. These accounts you said averaged about four months accounts?
—. Clothing accounts usually do.
Q. They were not in the clothing business?
A. Cloaks and suits—I meant cloaks and suits before.
Q. These accounts you say averaged about ninety to one hundred and twenty days?
A. Usually they buy on thirty and sixty and take four months.
Q. It is a fact, that within forty days, by September 27th, you had received $4,241.42?
A. Yes, sir.
Q. Within forty days?
A. Through the effort of Mr. Ralph Nathan, our attorney.
Q. Were those accounts anticipated?
A. That I don't know.
Q. Did he settle for less than face amounts?
A. That I don't remember either.

BENNO LEVISON, JR.

Sworn to before me this 6th day of April, 1907.

JULIUS LEWIS,
Notary Public, N. Y. Co.

303 I do not remember whether or not there was any one with Fellerman at any time that I had the transactions herein mentioned. We returned to Receiver collateral accounts $1,528.71/100.

BENNO LEVISON, JR.

Sworn to before me this 6th day of April, 1907.

JULIUS LEWIS,
Notary Public, N. Y. Co.

PLAINTIFF'S EXHIBIT No. 15, DEC. 10, 1908.

Bettcher-Lillard Co.
Women's Wearing Apparel and Furnishings, 212 Main Street,

OKLAHOMA CITY, OKLA., *M'ch* 3-06.

The National Discount Co., New York, N. Y.

DEAR SIRS: Your favor of the 28th ult. to hand relative to same wil- say, this, invoice was paid to A. Fellerman & Son, Oct. 12-1905, for which we hold returned check collected.

Yours truly, BETTCHER LILLARD CO.

Paid Rec'd.
Oct. 7,
$43.00.

304 PLAINTIFF'S EXHIBIT No. 16, DEC. 10, 1908.

W. B. Stevens & Co., General Dry Goods.

ALBANY, OREGON, *Mar.* 6, 1906.

The National Discount Co., 374 Broadway, N. Y.

GENTLEMEN: We have your communication of Feb. 28-1906, and will say that we have written you once considering the matter a/c A. Fellerman & Son for 278.00. Bill of July 6-05 dated as July 25.05 was paid Aug. 21-1905-check on Marshall Field & Co. #431. We would suppose you could get the information from A. Fellerman & Son without bothering us any more.

Yours truly, W. B. STEVENS & CO.

PLAINTIFF'S EXHIBIT No. 17, Dec. 10, 1908.

Olds, Wortman & King,
General Department Store,
Fifth, Sixth & Washington Sts.
Portland, Oregon.

Mail Order Department.

New York Office, 438 Broadway.

PORTLAND, OREGON, *M'ch* 7, 1906.

National Discount Co., 374-376 Broadway, New York.

GENTLEMEN: Replying to yours of the 28th ult. will state bill of A. Fellerman & Son, June 20th, $222.00 was remitted direct
305 to them on Aug. 15th, less amount of $55.50 charged for goods returned and 2% Discount $3.33, balance $163.17.

We cannot find that we have any record of notice making payment of this account to you,—consequently it went direct to A. Fellerman & Son.

Very truly yours,

OLDS, WORTMAN & KING,
Per T.

Paid Rec'r Sept. 15.

DEFENDANT'S EXHIBIT A, DEC. 8, 1908.

FEBRUARY 27TH, 1906.

Mess. James, Schell & Elkus, 50 Pine St., City.

GENTLEMEN: In answer to your communication *in re* Fellerman, we beg to state that we have a surplus at hand of about $800.00 and also have about $1800.00 worth of accounts yet to collect. We shall be pleased to show your representative our books, or give him such information that you may desire.

Respectfully yours,

THE NATIONAL DISCOUNT CO.,
J. LEWIS, *Sec'y.*

306 DEFENDANT'S EXHIBIT B, DEC. 8, 1908.

NEW YORK, *Feb.* 19, 1907. No. 107.

Union Exchange Bank, Fifth Avenue and 21st Street,

Pay to the Order of Robert Van Iderstine, Receiver A. Fellerman & Son $767.33/100.

Not more than Eight Hundred 800

Seven hundred and sixty seven and 33/100 Dollars.

NATIONAL DISCOUNT COMPANY.
BENNO LEVISON, JR., *President.*

Payable through N. Y. Clearing House.

(Side.)
National Discount Company.

(Back.)
Robert Van Iderstine, Receiver.
A. Fellerman & Son.
Payable to the order of the
Manhattan Trust Co.
Robert Van Iderstine
Trustee of
A. Fellerman & Son.
Stamp.
Stamp.

307 DEFENDANT'S EXHIBIT C, DEC. 8, 1908.

James, Schell & Elkus,
Counselors at Law,
50 Pine Street,
New York.

Abram I. Elkus.
Carlisle J. Gleason.
James N. Rosenberg.
Joseph M. Proskauer.

In re A. FELLERMAN & SON.

NEW YORK, *February 28th*, 1906.

The National Discount Company, 374 Broadway, New York City.

GENTLEMEN: Your courteous letter of the 27th received.

On behalf of the Trustee, we ask that you do not turn this money over to any person other than the Trustee in Bankruptcy.

We note your statement as to showing our representative your books. We should be very much obliged to you if you could find it convenient to answer the questions we asked in our letter to you, as that will save a great deal of time for all parties.

Very truly yours,

JAMES, SCHELL & ELKUS.

JNR—M.
Deliver.

Received Mar. 2, 1906.
Answered Mar. 2, 1906.
File No. —.

MARCH 2ND, 1906.

Mess. James, Schell & Elkus, Counselors at Law, 50 Pine Street, City.

GENTLEMEN: In reply to your valuable communication dated February 28th, we have taken due note regarding the moneys
308 in our possession. We enclose statement of the account, and further beg to state that a contract was signed by an elderly gentleman who signed A. Fellerman & Son. The interest we charged then was 6% per annum and our commission 5%. The Equity we are holding was assigned on the 18th day of August 1905 to Sam Gordon.

We have accounts still to be collected $1867.44 and we are making every effort to collect same. Trusting that we have given you details desired, we beg to remain,

Respectfully yours,

THE NATIONAL DISCOUNT CO.
J. LEWIS, *Sec'y.*

Dict. L.
One Encl.

DEFENDANT'S EXHIBIT D. DEC. 8, 1908.

Law Offices
James, Schell & Elkus,
50 Pine Street.

Abram I. Elkus.
Carlisle J. Gleason.
James N. Rosenberg.
Joseph M. Proskauer.

In re A. FELLERMAN & SON.

NEW YORK, *November 28th*, 1906.

The National Discount Company, 376 Broadway, New York City.

GENTLEMEN: Will you kindly let us know the name of every account that was transferred to you by A. Fellerman & Son, and the amounts of same, and which of such accounts are collected and which ones remain uncollected? Also, the amount of your advances.

309 In particular, we beg to ask, whether the accounts of Olds, Wortman & King and the Chase Dry Goods House were transferred to you.

Very truly yours,

JAMES, SCHELL & ELKUS,
Per R.

JNR—M.

Sent 12/3/06.
Received Nov. 30, 1906.
Answered Nov. 30, 1906.
File No. —.

DEFENDANT'S EXHIBIT E, DEC. 8, 1908.

James, Schell & Elkus,
Counselors at Law,
50 Pine Street,
New York.

Abram I. Elkus.
Carlisle J. Gleason.
James N. Rosenberg.
Joseph M. Proskauer.

In re FELLERMAN.

FEB. 26, 1906.

National Discount Company, 376 Broadway, N. Y. C.

GENTLEMEN: In Behalf of the Trustee in Bankruptcy we beg to inquire how much money you paid over to A. Fellerman & Son,

who failed in August, 1905. We understand that they transferred accounts to you shortly before that time. We should like a list of the accounts transferred to you, how much money you paid in consideration of the transfer, and what the nature of the transfer was. Was it a loan upon the accounts or an out and out purchase of the accounts? If a purchase, how much did you receive for
310 the moneys you advanced, and how much has been collected in money. If a loan, what consideration was agreed to be paid to you for loans, what interest was charged and what commission if any, did you charge, and what accounts were transferred to you?

You of course understand that we can *illicit* these facts from you by subpœn-ing you; if possible, we should like to save you the annoyance of this. We should like to know what transactions took place and the exact date. Was it with Mr. E. Fellerman or I. Fellerman?

Very truly yours,

JAMES, SCHELL & ELKUS.

JNR—G.

Received Feb. 27, 1906.
Answered Feb. 27, 1906.
File No. —.

311 DEFENDANT'S EXHIBIT F, DEC. 8, 1908.

Statement.

NEW YORK, *Nov. 30th*, 1906.

M-. A. Fellerman & Son to National Discount Co., Dr.

Terms —. 374 Broadway.

Total Am't Cash advanced A. F. & Son		$4470.35
Att'y Collection Fee		311.99
" " "		32.78
Interest 6%		18.17
Sundries		12.09
		4845.38
Cash collected on a/c above	$5612.71	5612.71
Credit Balance		767.33
Accounts still uncollected	1528.71	
Mdse. Ret'd to A. Fellerman & Son Discounts.	263.33	
Total Amount of acc'ts ret'd	7404.75	

To James, Schell & Elkus.

312 DEFENDANT'S EXHIBIT G, DEC. 8, 1908.

NEW YORK, 8/18, 1905.

Received from The National Discount Company Eleven Hundred & Twenty-Five & no/100 Dollars, charge same to — a/c.
$1125.00.

A. FELLERMAN & SON.

DEFENDANT'S EXHIBIT H, DEC. 8, 1908.

NEW YORK, 8/18, 1905.

Received from The National Discount Company Two Hundred & Sixty Seven & 73/100 Dollars, charge same to — a/c.
$267.73.

A. FELLERMAN & SON.

DEFENDANT'S EXHIBIT I, DEC. 8, 1908.

No. 643. NEW YORK, *Aug.* 15, 1905.

The Pacific Bank

Pay to the order of A. Fellerman & Son not more than Three Thousand 3000
Three Thousand & 00/100 Dollars.
$3000.00/100.

NATIONAL DISCOUNT COMPANY.
B. LEVISON, JR., *President.*

(Side.)
National Discount Company.

(Back.)
A. Fellerman & Son.
E. J. De Bold.

313 DEFENDANT'S EXHIBIT J.

Telephone Connection.

B. Levison, Jr., President. E. J. De Bold, Secretary.

The National Discount Co.
(Incorporated),
374 Broadway, New York.

We take the liberty of enclosing — of your — account, which is payable only to us.
Acting as their bankers, we will appreciate and thank you very

much if you will kindly look over this account and advise us by return mail if same is correct in every particular.

Very respectfully,

—— ——.

P. S.—We enclose stamped envelope for reply.

Reply.

The National Discount Co., New York City:

We hereby beg to confirm that the account — amount —, terms — is correct and due notice has been taken that same is assigned to you and that payments are to be made only to you.

Very respectfully,

—— ——.

314 DEFENDANT'S EXHIBIT K, DEC. 9, 1908.

NEW YORK, *Sept.* 16, 1905.

Received from The National Discount Company Twenty # Dollars, charge same to Ralph Nathan a/c.
$20.00/100.

RALPH NATHAN.

NEW YORK, 8/29, 1905.

Received from The National Discount Company, Forty Five & 00/100 Dollars, charge same to a/c.
$45.00/100.

RALPH NATHAN.

NEW YORK, 7/5, 1905.

Received from The National Discount Company, Fifty Five & 00/100 Dollars, charge same to On Memo a/c.
$55-

RALPH NATHAN.

NEW YORK, *Jul-* 25, 1905.

Received from The National Discount Company, Forty # Dollars, charge same to Ralph Nathan a/c.
$40.00/100.

RALPH NATHAN.

NEW YORK, 11/20, 1905.

Received from The National Discount Company, 221 99/100 Dollars, charge same to Ralph Nathan a/c.

RALPH NATHAN.

$—.

315 DEFENDANT'S EXHIBIT L, DEC. 9, 1908.

Ralph Nathan,
Counselor at Law,
53-63 Park Row, New York.
Telephone 2471 John.

National Discount Co. to Ralph Nathan, Dr.

To collection *in re* Fellerman account (Misch.)..... $32.78
327.80 at 10%.
Entered J. 169.
3/26/06.

Ralph Nathan,
Counselor at Law,
53-63 Park Row, New York.
Telephone 2471 John.

The National Discount Co. to Ralph Nathan, Dr.

1905.	To services rendered in N. B. C. vs. U. S. Gas Co. Exp.	20.00
	Trial and appeal.	
	To services N. D. C. vs. Fitch Exp.....	50.00
	To collections in the Fellerman case (Stix, Misch, Stevens, Lucas, Whitehouse, Phillipsborne, Wallace, Goodman, Lynd, Gimbel, Butterfield, Martin, Wieboldt, Lucas, Pearce, Gimbel, Kerr, Silversmith, Plummer.) Total 3119.96 at 10%.....	311.99
		381.99
	Rec'd on account	160.00
	Bal.	221.99

Rec'd payment,

RALPH NATHAN.

11/20/05.

316 DEFENDANT'S EXHIBIT "M," DEC. 9, 1908.

Marcuson Brothers,
Counselors at Law,
132 Nassau St.,
Vanderbilt Building.

Alex. S. Marcuson.
Jacob M. Marcuson.

Telephone 5134 John.

NEW YORK, *Sept. 12th*, 1905.

GENTLEMEN: We wish you would be kind enough and advise us what progress you are making in the collection of the account assigned to you by A. Fellerman & Son, the equity in which has been assigned to our client, Mr. Samuel Gordon.

Yours truly, MARCUSON BROS.

To National Discount Co., 374 Broadway, City.

317 DEFENDANT'S EXHIBIT N, DEC. 9, 1908.

United States District Court, Southern District of New York.

In the Matter of ABRAHAM FELLERMAN and ISADOR J. FELLERMAN, Individually, and as Co-partners, Trading as A. Fellerman & Son, Bankrupt.

Upon reading and filing the annexed affidavit of Emile Pincus, and upon the consent of Marcuson Brothers, attorneys for Samuel Gordon, it is

Ordered that the National Discount Company be and it hereby is directed to pay over to Robert Van Iderstine, Trustee in Bankruptcy herein, the sum of Seven Hundred and Sixty-seven and 33/100 Dollars ($767.33). And it is further

Ordered that the National Discount Company be directed to assign to the said Trustee, any accounts heretofore assigned to the National Discount Company by A. Fellerman & Son, and not yet collected.

Dated, New York, February 14, 1907.

C. M. HOUGH, *D. J.*

A true copy.
THOMAS ALEXANDER, *Clerk.*

We hereby consent to the entry of the foregoing order without notice.

MARCUSON BROTHERS,
Attorneys for Samuel Gordon.

318 United States District Court, Southern District of New York.

In the Matter of ABRAHAM FELLERMAN and ISADOR J. FELLERMAN, Individually, and as Co-partners, Trading as A. Fellerman & Son, Bankrupt.

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

Emile Pincus, being duly sworn, deposes and says:

I am an attorney-at-law and a clerk in the office of Messrs. James, Schell & Elkius. Referring to the settlement made of the claims against Samuel Gordon, I called on the National Discount Company and they admitted a surplus of Seven hundred and Sixty-seven and 33/100 Dollars ($767.33), besides various outstanding accounts not yet collected. They are willing to turn these moneys over to the Trustee upon their receiving an order from the Court to that effect. The only claimant to this fund is the Trustee, the claimant Samuel Gordon having transferred his claim to the Trustee herein.

Wherefore deponent respectfully prays for the granting of the annexed order.

EMILE PINCUS.

Sworn to before me this 13th day of February, 1907.
[SEAL.] NATHANIEL WALKOF,
Notary Public, No. 175, New York County.

319 DEFENDANT'S EXHIBIT O, DEC. 10, 1908.

F. R. Silversmith. I. B. Hiller.
S. & H. Garment Store,
925 16th St., opp. Joslins.
Reliable Goods. Popular Prices.

DENVER, COLO., *Oct. 31st,* 1905.

National Discount Co., New York.

GENTLEMEN: We are ready to pay the bill of A. Fellerman & Son, due to-morrow. but have been advised to investigate, regarding our liability to the bankruptcy court, as the receiver may claim we are liable to the court for this claim. Can you give us any information, or assurance that this bill will not be presented to us again for payment? We are not familiar with the bankruptcy laws, and are investigating the question, as we don't want to pay this amount a second time. Any information you can give us will be fully appreciated.

Yours truly, SILVERSMITH & HILLER.

11/3/3.

DEFENDANT'S EXHIBIT P.—12/10/08.

RALPH NATHAN.

1905				1905			
Oct. 11..	C. B.	126....	160.00	Nov. 20.		C. B. 158....	160.00
Dec. 11..	"	174....	25.00	Dec. 30.	By Balance.....		25.00
			185.00				185.00
1906				1906			
Jan'y 2..	To Balance.....		25.00	Mar. 6.		J 168	320.00
12..	C. B.	#2–186....	25.00	26.		" "	32.78
July 12..	J	186....	42.25	Dec. 31.	By Bal.....	" "	321.31
17..	C. B.	#3– 74....	25.00				
Aug. 14..	"	#3– 85....	75.00				
Sept. 10..	"	" 96....	50.00				
17..	"	#2–270....	25.00				
Oct. 1..	"	" 278....	50.00				
27..	"	#3–130....	25.00				
Nov. 1..	"	#4– 1....	25.00				
23	"	" 14....	30.00				
24..	"	" "	25.00				
Dec. 1..	J	–220....	183.67				
" ..		"	68.17				
			674.09				674.09

THE NATIONAL DISCOUNT COMPANY.

231

1907				1907		
Jan'y 2..	To Balance		321.31	Aug. 30.	J/270.....	500.00
June 24..	C. B.	#3–207....	60.00			
July 8..	"	" 210....	25.00			
Sept. 13..	"	#4– 94....	25.00			
Dec. 16..	"	" 120....	65.00			
" ..	"	" "	3.69			
			500.00			500.00
1908						
July 31..	C. B.	#5– 36....	35.00			

321

Cash Book
Fol. # 158

Statement.

NEW YORK, *Dec.* 9, 1908.

Mr. Ralph Nathan.

.....

To National Discount Company, Dr.

1905 682 Broadway.

.....

July	5	Cash (Carried on Memo until.....	
	25	" Oct. 11/05 and then.....	$55.00
Aug.	29	" charged to Ralph Nathan.....	40.00
Sept.	16	" account)	45.00
Nov.	20	" Petty cash book 243.....	20.00
			221.99
			381.99

Cr.

Services rendered	
in N. D. C. vs. U. N. S. Cas. Co.....	20.00
" " " Fitch	50.00
Collection in Fellerman case 3119.96 at 10%.....	311.99
	381.99

322 DEFENDANT'S EXHIBIT Q, DEC. 10, '08.

Copy.

A. Fellerman & Son, Manufacturers of Ladies' and Misses' Cloaks and Suits, 7 East 17th Street.

NEW YORK, *Jan'y* 26, 1905.

Mr. W. A. Dakins.

DEAR SIR: Enclosed please find statement as you requested and hope you will find same satisfactory.

Resp. yours,

A. FELLERMAN & SON.

Copy.

(Outside.)

Bradstreets, 346 and 348 Broadway, New York City.

To A. Fellerman & Son, 7 East 17th Street, New York City.

January 27, 1905.

(Inside.)

57*a* Additional Statement Individuals or Firms.

The Bradstreet Company, Incorporated.

JANUARY 26, 1905.

GENTLEMEN: The following is a statement of our financial condition as it appeared on the 20 of January, 1905, same being based on Inventory, viz:

Please state if estimate or inventory, giving date.

323 Assets of all kinds, in and out of the business.

Merchandise, Actual Value	$32,363.24
Notes and Accounts Receivable, actual Value	45,764.28
Cash on hand and in bank	10,621.53
Machinery, Actual Value.	
Fixtures, Actual Value	5,000.00
Real Estate—Actual Value of all owned, $——	
Less Homestead, if exempt by law.	
Other assets.	
	$93,749.05

Tell name & surname of each partner

	age	married?
Abraham Fellerman		Yes.
Isadore J. Fellerman		No.

Net responsibility of each is as follows:.....

.....

(Other Side.)

Direct liabilities of all kinds, in and out of the business.

On open account for merchandise	$9,245.25
On notes given for Merchandise	
To banks for borrowed money	
To others for borrowed money	
To relatives, employees or others for money left on deposit not included above	
On real estate	
Other indebtedness	
Amount to balance, showing net wealth	84,503.80
	$93.749.05

How much of the indebtedness is past due..... $

324 If any of the liabilities enumerated above are secured by mortgage give details below.
Amount of mortgage or lien on Merchandise
Amount of mortgage or lien on Machinery
Amount of mortgage or lien on Real Estate
Give style and location of branches or other business interests.

(Back.)

Sales the past year $256,743.75.
Insurance on Stock, $35,000.
Insurance on Buildings,
Real Estate mentioned in this statement stands in name of
.....
And is located at
Bank with Oriental
Union Exchange
Buy principally of Oelbermann, Dommerich & Co.
H. A. CAESAR.
WM. ISELIN & CO.
FLEITMANN & CO.
References

(Please sign) A. FELLERMAN & SON.
Signature of Firm or Individual.

325 DEFENDANT'S EXHIBIT R, DEC. 10, 1908.

Telephone Connection.

Office of A. Fellerman & Son, Manufacturers of Ladies' and Misses' Cloaks and Suits, 7 East 17th Street.

NEW YORK, *Jan.* 26, 1905.

R. G. DUN & Co.:

GENTLEMEN: Enclosed please find statement as requested and hope same proves satisfactory.

Respectfully yours, A. FELLERMAN & SON.

(Copy.)

Copy. 176-12.

Statement of Financial Condition Made to R. G. Dun & Co.

Name and age of each partner: Abraham Fellerman, Isadore J. Fellerman.
Firm name: A. Fellerman & Son.
Engaged in Cloaks & Suits Business, at No. 7 East 17th Street, City of N. Y. County of N. Y. State of N. Y.
From inventory of January 20th, 1905. Dated Jan'y 26th, 1905.

Assets.

Merchandise on hand, cost		$32,363.24
Outstanding accounts, new		45,764.28
Outstanding accounts over one year old		
Bills receivable		
Machinery and Fixtures	(	5,000.00
Cash on hand	(	3,246.73
Cash in banks	(7,374.80	7,374.80
Total available assets		93,749.05

326 *Liabilities.*

For Merchandise on hand, $..... In transit, $.....	$9,245.25
For merchandise past due	
Loans from bank	
Loans other than from bank	
Other obligations	
Total liabilities	$9,245.25
Surplus in business	84,503.80

Real Estate: Describe, locate, and value separately, and in whose name held .....

Total value of real estate..... $

Mortgages or amount unpaid thereon..... $

Equity in real estate.....

Other personal assets, consisting of.....

.....

Total worth, in and out of business..... $

Do you keep books of account of the business.....

If so, what books?.....

Do you borrow on accounts receivable? No.

Ever Burned Out? If so, state circumstances, insurance recovered, etc. Never.

Insurance on Stock $35,000. On Buildings, $

Annual business amounts to $256,743.75. Annual Rent $3,500.

Amount of chattel mortgages or judgments $

Bank } Union Exchange Bank.

References. { Oriental Bank.

A. FELLERMAN & SON.
Sign here full name of firm.

.....
By whom signed. Member of firm.

.....

Please write additional remarks on reverse side, together with References or Principal houses where purchases are made.

327 DEFENDANT'S EXHIBIT S.

A. Fellerman & Son, Mnfrs. Cloaks & Suits, New York City.

Abraham Fellerman,
Isidor J. Fellerman.

JUNE 16, 1905, 7 EAST 17TH ST.

This firm has been in existence since Jan. 1, 1903, and succeeded to the business which had previously been conducted by A. Fellerman alone.

The senior is aged about 53 and is understood to have commenced his business career as a peddler; in the early eighties he was engaged in the retail liquor business at 226 Division St. and 2 Orchard St., in the name of his wife, Fannie Fellerman. It is understood that shortly prior to starting in that line had become financially involved; however, the claims against him were settled about Aug. 1892, at which time he resumed his own name. In the latter part of 1892 he started as a cloak manufacturer at 58 East Broadway, as a partner in the firm of Fellerman & Goldberg, which concern dissolved April 27, 1898, each partner continuing business alone.

Isidor J. Fellerman is about 25 years of age and had been in his father's employ for several years prior to his admission as a partner.

In May, 1898, the senior claimed a responsibility of $16,083, over debts of $2,500; Dec. 1900, surplus $46,160, over liabilities $2,875, and in Dec. 1901, surplus $57,765, over an indebtedness of $8,543. In Jan. 1903 he furnished statement as of condition Dec. 24, 1902 which showed assets of $69,490, over debts of $6,350, and he also stated at that time that his son had contributed to capital $2,000, his own savings, which amount was included in statement of Dec. 1902.

On Dec. 28, 1903, the concern claimed surplus of $77,887.
328 over liabilities of $6,876, while statement furnished as of condition of Jan. 20, 1905, was as follows:

Assets.

Merchandise	$32,363.24
Outstanding accounts, new	45,768.28
Machinery and fixtures	5,000.00
Cash on hand	3,246.73
Cash in banks	7,374.80
	$93,749.05

Liabilities.

For merchandise	9,245.25
Surplus	$84,503.80

Do not borrow on accounts receivable. Have never been burned out. Insurance on stock $35,000. Annual business $256,743.75.

Annual rent $3,500.

They have been sold their requirements by a number of representatives houses, lines varying from $1,000 to $3,000, in one or two quarters larger amounts, on sixty days, and are said to meet their obligations as agreed. By those who know them they are believed to have probably at least held their own during the past season. Their statement of January last was looked upon as a fair one.

(D x 2)

329 DEFENDANT'S EXHIBIT T, DEC. 10, 1908.

134 *Statement.*

Date 8/18/05.

Name A. Fellerman & Son.
City.....
Gross, $2495.50
E
Net, 2379.30
———% $.....
Loan, $1125
124.78

Interest, $1000.22
Collection Chgs. } .....
Commission $ { 5% 124.78
Check, $1000.22
.....

134 *Statement.*

Date 8/18/05.

Name A. Fellerman & Son.
City.....
Gross, $5232.39
Net, $5025.45
75%.. 3000.00
% $2250.00
500% 2025.45
Loan, $3267.73 1017.73
261.62

$3006.11
Collection Chgs. } .....
Commission, $ { 5% 261.62
Check, $3006.11
on a/c 3000.00

6.11

330 DEFENDANT'S EXHIBIT U.

AUGUST 18TH, 1905.

Balance	2667.96
Cash from Pacific Bank	1000.00
" " " "	1200.00
" " H. Krobarens a/c	
G. A. Moss Co.	5.62
Com. from A. Fellerman & Son	261.62
" " "	124.78
" " Met Waist Co.	11.90
"	25.00
"	20.00
	5316.88

AUGUST 18TH, 1905.

H. C. Holstein	225.00
H. B. Rothenn Exchge.	50.00
S. Reilly "	30.00
Draft 109 Munzer Mfg. Co.	10.00
" 392 B. Levison, Jr.	54.75
A. Fellerman & Son	267.73
" "	1125.00
Metropolitan Waist Co.	430.00
" " E.	200.00
Stamps 250—23	50.00
	2397.48
By balance	2919.40
	5316.88

Copy Page 162/163.
Petty Cash—

JULIUS LEWIS, *Sec'y.*

331 DEFENDANT'S EXHIBIT V, DEC. 10, 1908.

Ralph Nathan, Counselor at Law, 53-63 Park Row.

Telephone 2471 John.

NEW YORK, *Aug. 24th, '05.*

Olds, Wortman & King, Portland, Oregon.

GENTLEMEN: Enclosed you will find duplicate statement of your indebtdeness to the National Discount Company, which was assigned to it by A. Fellerman & Son of this city, as per information received by you hitherto.

All checks should be made payable and mailed to the National Discount Company or to me. A payment to any other person will be at your own risk.

I believe that your indebtedness is past due and we will be pleased to receive a remittance.

Respectfully, RALPH NATHAN.

332 At an Equity Term of the United States District Court, held in and for the Southern District of New York, at the Federal court rooms in the Post Office Building, in the Borough of Manhattan, City of New York, on the 4th day of January, 1908.

Present—Honorable George C. Holt, District Judge.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant,

against

THE NATIONAL DISCOUNT COMPANY and ABRAHAM FELLERMAN and Isidore J. Fellerman, Individually and as Copartners, Trading under the Name of A. Fellerman & Son, Defendants.

A bill of complaint having been filed in the office of the Clerk of the United States District Court for the Southern District of New York, by Robert Van Iderstine, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, praying that certain transfers of outstanding accounts receivable be set aside as fraudulent, and that the National Discount Company be required to account for all the moneys received by it by virtue of the said pretended transfer, and an answer having been filed by the National Discount
333 Company to the said bill of complaint, and a replication having been filed by the Trustee, and the said matter coming on for trial before this court, at an Equity Term thereof, on the 8th day of December, 1908, and a jury having been impaneled to aid this court in finding a determination of the facts, and the issues raised between the complainant and defendant having been submitted to the said jury, and the jury having found for the complainant on the issues so submitted, and this court having accepted and adopted the finding of the said jury as its own;

Now, upon reading and filing the bill of complaint filed by Robert Van Iderstine in the above entitled action and the answer to the said bill of the defendant The National Discount Company, and the replication of the said complainant, and upon the finding of the jury that the complainant was entitled to recover from The National Discount Company the sum of four thousand seven hundred sixty-seven and 76/100 ($4,767.76) Dollars, with interest, and upon motion of James, Schell & Elkus, attorneys for the Trustee, it is

Ordered, adjudged and decreed that Robert Van Iderstine, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, individually and as members of the firm of A. Fellerman &

Son, recover from the defendant The National Discount Company the sum of Four thousand seven hundred sixty-seven and 76/100 ($4,767.76) Dollars, with interest from the 27th day of September, 1905, amounting to nine hundred twenty-nine and 71/100 ($929.71) Dollars, and costs amounting to One hundred five 40/100 ($105.40) Dollars, aggregating in all the sum of Five thousand eight hundred two 87/100 ($5802.87) Dollars.

GEO. C. HOLT, *U. S. D. J.*

334 (Endorsed:) United States District Court, Southern District of N. Y.—Robert Van Iderstine, as Trustee et al., Complainant, against The National Discount Company, et al., Defendants.—Copy Judgment.—James, Schell & Elkus, Attorneys for complainant, 170 Broadway, Borough of Manhattan, New York City.—Filed Jan. 4, 1909.

Please take notice that the within is a copy of judgment this day duly entered and filed in the within entitled action in the office of the Clerk of the U. S. District Court in the Borough of Manhattan, in the City of New York.—Dated, New York, Jan. 4, 1909.—Yours, &c., James, Schell & Elkus, Attorneys for Complainant, 170 Broadway, Borough of Manhattan, New York City.

335 At an Equity Term of the United States District Court, Held in and for the Southern District of New York, at the Federal Court Rooms, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 18th Day of January, 1909.

Present—Honorable George C. Holt, District Judge.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant,

against

THE NATIONAL DISCOUNT COMPANY and ABRAHAM FELLERMAN and Isidore J. Fellerman Individually and as Copartners, Trading under the Name of A. Fellerman & Son, Defendants.

The issues in the above entitled action having duly come on regularly to be tried before the Hon. George C. Holt, Judge of this Court, and a jury, on the 8th, 9th, 10th and 11th days of December, 1908, and the proofs of the respective parties hereto having been heard and submitted, and the jury having rendered a verdict in favor of the plaintiff and against the defendant, The National Dis-
336 count Company, for the sum of ($4,767.76) Four thousand seven hundred sixty-seven and 76/100 dollars, together with interest and costs, and the said defendant, The National Discount Company, having moved to set aside the verdict and for a new trial upon the ground that the said verdict was against the evidence, against the weight of the evidence, contrary to law, and excessive.

Now, after hearing I. Gainsburg, Esq., of Counsel for the defendant, The National Discount Company, in support of the said motion, and Abraham I. Elkus, Esq., of Counsel for the Complainant, in opposition thereto, and due deliberation having been had thereon, it is, on motion of James, Schell & Elkus, attorneys for the Complainant,

Ordered that the said motion be and the same is hereby in all respects denied.

Enter.

GEO. C. HOLT, *U. S. J.*

(Endorsed:) United States District Court, Southern Dist. of N. Y.—Robert Van Iderstine, etc., plaintiff, against The National Discount Company, et al., defenfant-.—Copy Order Denying Motion for a New Trial and Notice of Settlement.—Gainsburg & Solomon, Attorneys for Defendant, Barclay Building, 299 Broadway, Borough of Manhattan, New York City.—Filed Jan. 20, 1909.

SIR: Please to take notice that the within is a copy of an order this day duly entered in the office of the Clerk of this Court in this action.—Dated, N. Y., January 18, 1909.—Yours, &c., Gainsburg & Solomon, Attorney- for Def't-, Office and Post Office Address, 299 Broadway, Borough of Manhattan, New York City.—To James, Schell & Elkus, Esqs., Attorneys for Plaintiff.

337 SIR: Please to take notice that an order of which the within is a true copy will be presented for settlement and entry herein to Mr. Justice George C. Holt, Judge of the District Court of U. S. South. Dist. of N. Y., at the Federal Court Rooms in the City of New York, on the 15 day of January, 1909, at 10.30 o'clock, in the forenoon, or as soon thereafter as Counsel can be heard.—Dated, N. Y., January 13, 1909.—Yours, &c., Gainsburg & Solomon, Attorneys for —, 299 Broadway, Borough of Manhattan, New York City.—To James, Schell & Elkus, Esqs., Attorneys for Pl'ff.

District Court of the United States for the Southern District of New York.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant,

against

THE NATIONAL DISCOUNT COMPANY et al., Defendants.

Upon motion of Gainsburg & Solomon, attorneys for the defendant-appellant, The National Discount Company,

It is ordered that an appeal to the United States Circuit
338 Court of Appeals for the Second Circuit, from the judgment and decree entered and filed herein on the 4th day of January, and the order denying the defendant's motion for a new trial, entered and filed herein on the 18th day of January, 1909, be and

the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of Seven thousand Dollars, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal, when approved by the Court.

Dated New York, March 1, 1909.

GEO. C. HOLT, *U. S. D. J.*

339 District Court of the United States for the Southern District of New York.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant,

against

THE NATIONAL DISCOUNT COMPANY et al., Defendants.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Benno Levison, Jr., respectfully shows to this Honorable Court, and alleges:—

I. That he is the President of the National Discount Company, a corporation organized under the Laws of the State of Maine, and having its principal place of business and office at the Borough of Manhattan, City of New York, County and State of New York, and duly authorized to transact its business in said City of New York, of the State of New York, and that he is personally acquainted with all of the transactions forming the subject matter of the above entitled action.

340 II. That in or about the month of May, 1907, a Bill of Complaint was filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, which said Bill of Complaint demanded judgment setting aside certain assignments and transfers of accounts and bills receivable, on the ground that the said transfers were fraudulent, and made for the purpose of hindering, delaying and defrauding the creditors of A. Fellerman & Son, and were made in pursuance of a fraudulent device and scheme on the part of the said A. Fellerman & Son, and The National Discount Company, to hinder, delay and defraud creditors of the said A. Fellerman & Son, and were part of a fraudulent scheme and conspiracy entered into between the said A. Fellerman & Son, and the National Discount Company, thereby to hinder, delay and defraud the creditors of the said A. Fellerman & Son, and that the National Discount Company had full knowledge of said fraudulent intention, and was not a purchaser in good faith of the said accounts, and did not pay a present and fair consideration therefor, but took said transfers with the intention to aid the con-

summation of the said fraudulent scheme on the part of said A. Fellerman & Son; and the said Bill of Complaint further prayed that the said The National Discount Company be directed to account for all the money received from said accounts transferred to it as aforesaid, and that it be directed to turn over and repay to the trustee, the complainant herein, all moneys realized on the collection of the said accounts.

III. The defendant answered said complaint on the 28th day of June, 1907, whereby it denies each and every one of the material allegations of the Bill of Complaint, and set forth that there was transferred to it by A. Fellerman & Son, outstanding accounts amounting to the gross sum of $7,027.89, as security for the payment of advances made to A. Fellerman & Son, and admitted that
341 it had collected thereon the sum of $5,612.71, and that it advanced to A. Fellerman & Son before the proceedings in Bankruptcy were instituted against them, the sum of $4,125.00; that its charges for collection, interest, attorneys' fees, postage, and sundries, amounted to the sum of $761.43, and that the balance of the moneys collected by it, amounting to the sum of $767.33, being the surplus moneys over and above its advances and charges, were, on the 19th day of February, 1907, paid to and accepted by the trustee, the complainant herein; that the balance of the uncollected accounts were also retransferred and reassigned to the said complainant.

IV. The defendant further alleged that the advances made upon the outstanding accounts as collateral security were made in good faith, for a present fair consideration, and without any intent on its part to hinder, delay or defraud the creditors of the said A. Fellerman & Son, or with any knowledge on its part of said intent on the part of A. Fellerman & Son, and denied that it had any knowledge of, or was a party to, a conspiracy of A. Fellerman & Son, to defraud their creditors.

V. That thereafter, and on the 8th day of December, 1908, this action duly came on for trial before the Hon. George C. Holt, and a jury, and was tried on that day, and on the 9th and 10th days of December, 1908, and was concluded on the 11th day of December, 1908.

VI. That the defendant's motion to dismiss the Bill of Complaint herein made both at the end of the complainant's case, and at the and of the entire case, was denied by the Court, and the case was allowed to go to the jury.

VII. The jury rendered a verdict in favor of the complain-
342 ant and against the defendant for the sum of $4,767.76, being the difference between the amount collected by the National Discount Company, and the accounts transferred to it, and the sum of $767.33 turned over by it to the trustee, and retained by him, together with interest on said amount from the 27th day of September, 1905.

VIII. That thereafter the defendant, The National Discount Company, moved to set aside the verdict as against the evidence, against the weight of evidence, contrary to law, and excessive, and for a new trial upon the same grounds, both of which motions were denied.

IX. The defendant was granted a stay of sixty days, within which to make a case, after the entry of judgment.

X. That thereafter, a judgment was duly entered in the office of the Clerk of this Court, in favor of the complainant and against the defendant, The National Discount Company, for the amount aforesaid, together with the costs of the action, making a total of $5,802.87, on the 4th day of January, 1909, and an order was also entered on the 18th day of January, 1909, upon the denial of the defendant's motions to set aside the verdict and for a new trial.

XI. Your petitioner further alleges, upon information and belief, that by the said verdict of the jury, and the judgment entered thereon, and the order of the said District Court, denying the defendant's motion to set aside the verdict and for a new trial, error has been committed, and further, that error has been committed by the rulings of the said District Court, in the trial of the case and on the defendant's motions for a dismissal of the Bill of Complaint
343 made both at the end of the complainant's case, and renewed at the end of the entire case, and that error was committed by the District Court, in its charge to the jury, and in its refusals to charge as requested by the defendant, and your petitioner feels aggrieved thereby, and is desirous of obtaining a review by the United States Circuit Court of Appeals for the Second Circuit, upon errors assigned in the Assignment of Errors filed herein, and your petitioner will file with the Clerk of this Court a bond with sufficient sureties, in acordance with the rule of practice of this Court, conditioned for the payment of damages and costs to the respondent in the event that the said judgment and order should be affirmed by the said Circuit Court of Appeals for the Second Circuit.

Wherefore your petitioner prays that an appeal may be allowed, and citation herein be issued for a review of the said judgment by the United States Circuit Court of Appeals for the Second Circuit, and a transcript of the record, papers and proceedings upon which the said order and judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will ever pray.

Dated, New York, February 26th, 1909.

NATIONAL DISCOUNT CO.
BENNO LEVISON, Jr.

GAINSBURG & SOLOMON,
Attorneys for Defendant, 299 Broadway,
Borough of Manhattan, New York City, N. Y.

(Endorsed:)—United States District Court. Southern Dist. of N. Y.—Robert Van Iderstine, as Trustee, etc., Plaintiff, against The National Discount Company, et al., Defendant.—Copy Order
344 and Petition to Allow Appeal, and Notice or Filing.—Gainsburg & Solomon, Attorneys for Deft., National Discount Co., Barclay Building, 299 Broadway, Borough of Manhattan, New York City.—Filed March 1, 1909.

By the Honorable —— ——, one of the Justices of the District Court of the United States for the Southern District of New York, in the Second Circuit:

The President of the United States of America to Robert Van Iderstine, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, individually and as members of the firm of A. Fellerman & Son, in Bankruptcy:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Second Circuit, to be held at the Borough of Manhattan, in the District and Circuit above named, on the 29th day of March, in the year one thousand nine hundred and nine, pursuant to an order allowing an appeal, entered in the office of the Clerk of the United States District Court for the Southern District of New York, from a judgment and order in that certain action in which The National Discount Company, is defendant-appellant, and you, the said Trustee, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, individually and as members of the firm of A. Fellerman & Son, are complainant and appellee, to show cause if there be, why the said judgment and decree and order as in said order allowing the appeal men-
345 tioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, City of New York, in the District and Circuit above named, this 1st day of March, 1909.

GEO. C. HOLT,
U. S. D. J.

(Endorsed:)—United States District Court, Southern Dist. of N. Y.—Robert Van Iderstine, as Trustee, etc., Plaintiff, against The National Discount Company, et al., Defendant.—Copy Citation and Notice of Filing.—Gainsburg & Solomon, Attorneys for Deft., National Discount Co., Barclay Building, 299 Broadway, Borough of Manhattan, New York City.—Filed March 1, 1909.

346 District Court of the United States, for the Southern District of New York.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant,

against

THE NATIONAL DISCOUNT COMPANY et al., Defendants.

Comes now The National Discount Company, the appellant and defendant in error, by Gainsburg & Solomon, its attorneys, and says, that in the proceedings in the above-entitled Court there is manifest error, and it makes and files the following assignment of errors:

I.—That the United States District Court for the Southern Dis-

trict of New York erred in refusing to dismiss the bill of complaint filed by the complainant herein, as requested by the defendant, at the end of the complainant's case.

II.—That the United States District Court for the Southern District of New York erred in holding at the end of the complainant's case that there was a question of fact for the jury, and in allowing the case to go to the jury.

III.—That the United States District Court for the South-
347 ern District of New York erred in refusing to dismiss the bill of complaint filed by the complainant herein, as requested by the defendant, at the end of the entire case.

IV.—That the United States District Court for the Southern District of New York erred in holding at the end of the entire case, that there was a question of fact for the jury and in allowing the case to go to the jury.

V.—That the United States District Court for the Southern District of New York erred in holding that the transfers of accounts by A. Fellerman & Son to The National Discount Company, the defendant, upon which the said A. Fellerman & Son received advances, was fraudulent, and made for the purpose of hindering, delaying and defrauding the creditors of A. Fellerman & Son, and made in pursuance of a fraudulent device, scheme and conspiracy on the part of A. Fellerman & Son, to which the defendant was a party, to hinder, delay and defraud the creditors of A. Fellerman & Son, and in holding that these were all questions of fact for the jury.

VI.—That the United States District Court for the Southern District of New York erred in holding that the defendant had knowledge of the fraudulent intent on the part of A. Fellerman & Son, and participated in the said fraud, or had reasonable cause to believe that a fraud was being perpetrated upon the creditors of A. Fellerman & Son, and that there were facts brought to the defendant's notice sufficient to put it upon inquiry to lead to a discovery of such fraud, and erred in holding that these were all questions of fact for the jury.

VII.—That the United States District Court for the Southern District of New York erred in holding that the transaction
348 between the defendant and A. Fellerman & Son was not a bona fide transaction made in good faith, and for a present fair consideration, and in holding that the defendant acted with intent on its part to aid the consummation of a fraudulent scheme and conspiracy on the part of the said A. Fellerman & Son to defraud their creditors, and in holding these were all questions of fact for the jury.

VIII.—That the United States District Court for the Southern District of New York, erred in failing to hold that the advances made by the defendant to A. Fellerman & Son upon the outstanding accounts received by it as collateral security were made in good faith, for a present fair consideration and without any intent on its part to hinder, delay and defraud the creditors of the said A. Fellerman & Son, and without any knowledge on its part of any fraudulent intent on the part of A. Fellerman & Son, and that it had no knowl-

edge of and no participation in any such fraud, and that it was not a party to any conspiracy on the part of A. Fellerman & Son to defraud their creditors.

IX.—That the United States District Court for the Southern District of New York erred in allowing Abraham Fellerman, the complainant's witness, to testify, over the objection of the defendant, as to his transactions with reference to the purchase and sale of certain accounts by one Stitch, all of which was had in the absence of the defendant, its duly authorized agents or representatives, and without any proof that the defendant had any knowledge thereof, or was a party to the transaction or participated therein.

X.—That the United States District Court for the South-
349 ern District of New York erred in allowing said Fellerman to testify, over the objection of the defendant, to his transactions with reference to the purchase and sale of certain accounts by one Gordon, all of which was had in the absence of the defendant, or its duly authorized agents or representatives, and without any proof that the said defendant had any knowledge thereof, or was a party to the said transaction or participated therein.

XI.—That the United States District Court for the Southern District of New York erred in charging the jury and holding, that if the jury should render a verdict in favor of the complainant, and against the defendant, and the verdict is paid, the defendant is entitled to become a general creditor of the bankrupt for the amount paid, and to prove its claim in the bankruptcy proceedings of A. Fellerman & Son.

XII.—That the United States District Court for the Southern District of New York erred in charging the jury and holding, that it is very true in cases of bankruptcy, when a man is going to fail that he turns his assets into cash and pays certain creditors.

XIII.—That the United States District Court for the Southern District of New York erred in charging the jury and in holding that a preference, that is, the preferring of one creditor or class of creditors over another, is just as much within the provisions and within the terms of the Bankruptcy Act, as though the bankrupts had concealed same from their creditors, meaning thereby, that property turned over to creditors to prefer them is the same as though it had been concealed from creditors.

XIV.—That the United States District Court for the South-
350 ern District of New York erred in charging the jury and in holding, that paying certain favored creditors and leaving most of the general creditors without any payment is evidence of a fraudulent intent, and that from the evidence in the case it is matter which the jury would not be troubled with in coming to a conclusion, and in holding that the act of preferring of creditors over other creditors is evidence of a fraudulent intent.

XV.—That the United States District Court for the Southern District of New York erred in charging the jury, and in holding that if the amount of compensation were excessive in their opinion, it was a circumstance to be taken into consideration in passing upon the bona fides of the transaction.

XVI.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury, as requested by the defendant, and in refusing to hold, that where moneys is actually loaned on accounts transferred as security, the amount of the loan in proportion to the value of the security is not material in determining the question of a present fair consideration and the bona fides of the said transaction.

XVII.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury, as requested by the defendant, and in failing to hold that the payments in cash of the advances made by the defendant on the accounts, instead of by check, are not in themselves any evidence of intent on the part of the defendant to hinder, delay and defraud creditors.

XVIII.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury as requested by the defendant, and in failing to hold, that if the
351 jury believed that the defendant relied upon the rating of A. Fellerman & Son in Dun's and Bradstreet's, it was not necessary for it to make any further investigations with reference to the financial condition of A. Fellerman & Son, and the failure so to do is not evidence of an intent on the part of the defendant to hinder delay and defraud creditors.

XIX.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury, as requested by the defendant, and in failing to hold that the testimony that all moneys obtained by A. Fellerman & Son from the defendant were deposited in their account, and used by them to pay obligations of the firm, is uncontradicted.

XX.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury, as requested by the defendant, and in failing to hold that there is no evidence in the case that the debts paid by A. Fellerman & Son were not legitimate debts of the firm.

XXI.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury, as requested by the defendant, and in failing to hold, that it was not fraudulent for A. Fellerman & Son to use the money borrowed by them from the defendant, to pay legitimate debts, although the erditors so paid obtained thereby a preference over the other creditors.

XXII.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury, as requested by the defendant, and in failing to hold, that the preferring of one creditor over other creditors of the same class, by the
352 repayment to him of his debt, is not a fraud under the Bankrupt Law.

XXIII.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury, as requested by the defendant, and in failing to hold, that it was not fraudulent for the defendant to advance moneys to A. Fellerman & Son, to be used by them in paying legitimate debts, although by

receiving such payments, those creditors thereby received a preference over other creditors.

XXIV.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury, as requested by the defendant, and in failing to hold, that there was no proof *of* evidence of any guarantee under the terms of which the defendant could not recover the money loaned to A. Fellerman & Son.

XXV.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury as requested by the defendant, and in failing to hold, that if they did not believe the testimony of Abraham Fellerman that the defendant proposed to him to take stock in its company for his equity, which he could transfer to his wife or daughter or any one else, then the verdict must be for the defendant.

XXVI.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury as requested by the defendant, and in failing to hold, that there was no proof or evidence in the case that the defendant and A. Fellerman & Son, the bankrupts, had any secret understanding and agreement with reference to the failure of the firm of A. Fellerman & Son.

353 XXVII.—That the United States District Court for the Southern District of New York erred in refusing to charge the jury as requested by the defendant, and in refusing to hold, that if the verdict in this action is for the defendant, the trustee may obtain an accounting as to the surplus over and above the loans actually made, in which action the propriety of the charges for commissions and expenses may be investigated and determined.

XXVIII.—That the United States District Court for the Southern District of New York erred in refusing to set aside the verdict of the jury in favor of the complainant and against the defendant, The National Discount Company, as against the evidence, against the weight of evidence, contrary to law and excessive, as requested by the defendant.

XXIX.—That the United States District Court for the Southern District of New York erred in refusing to grant the defendant a new trial upon the ground that the verdict of the jury was against the evidence, against the weight of evidence, contrary to law and excessive.

XXX.—That the United States District Court for the Southern District of New York erred in rendering a decree upon the verdict of the jury in favor of the complainant and against the defendant.

XXXI.—That the United States District Court for the Southern District of New York erred in failing to render a decree in favor of the defendant.

XXXII.—That the United States District Court for the Southern District of New York erred in decreeing that the complainant
354 recover from the defendant, the sum of $5,802.87, or any sum whatsoever.

Wherefore, the National Discount Company, the defendant, prays

that the judgment and order of the District Court of the United States, for the Southern District of New York, entered respectively on the 4th and the 18th days of January, 1909, be reversed, and the Bill of Complaint dismissed, or in the alternative, that the defendant be granted a new trial, and for such other and further relief in the premises as to the Court may seem just and proper.

Dated New York, February 26th, 1909.

(Endorsed:)—United States District Court, Southern Dist. of N. Y.—Robert Van Iderstine, as Trustee, etc., Plaintiff, against The National Discount Company et al., Defendant.—Copy. Assignment of Errors.—Gainsburg & Solomon, Attorneys for Deft. The National Discount Co., Barclay Building, 299 Broadway, Borough of Manhattan, New York City.—Filed Mar. 1, 1909.

355 District Court of the United States for the Southern District of New York.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, as Members of the Firm of A. Fellerman & Son, Complainant,

against

NATIONAL DISCOUNT COMPANY et al., Def'ts-App'l'ts.

It is hereby stipulated and agreed between the attorneys for the respective parties hereto, as follows:

That on the 19th day of August, 1905, an involuntary petition in Bankruptcy was filed against Abraham Fellerman and Isidore J. Fellerman, individually and as members of the firm of A. Fellerman & Son.

That a subpœna was issued upon said petition, which subpœna was served upon one of the Fellermans by the United States Marshal.

That on the 19th day of August, 1905, by an order of this Court, and upon consent of Leonard Bronner, attorney for A. Fellerman & Son, Robert Van Iderstine was appointed temporary receiver, and he duly qualified and entered upon the discharge of his duties as such receiver.

356 That thereafter the property of the said Bankrupts was appraised by appraisers duly appointed by order of this Court dated the 23d day of August, 1905, and said appraisal was duly filed in the office of the Clerk of this Court.

That on the 21st day of September, 1905, by order of this Court duly entered herein, the said Abraham Fellerman and Isidore J. Fellerman, individually and as members of the firm of A. Fellerman & Son, were adjudged Bankrupts.

That after said adjudication a meeting was held at the office of the Referee in charge of the said matter, and Robert Van Iderstine, the temporary receiver herein, was duly elected trustee, and thereafter he duly qualified as such by filing his bond, which was duly approved by order of the Referee.

It is further stipulated and agreed that Plaintiff's Exhibit 12 is identical in every respect with plaintiff's Exhibit 10, with the exception that Plaintiff's Exhibit 10 does not contain the words appearing in paragraph 5 of Plaintiff's Exhibit 12, as follows: "with attorney's costs."

It is further stipulated and agreed that this stipulation shall be printed as part of the appeal record herein.

Dated New York, March 19th, 1909.

JAMES, SCHELL & ELKUS,
Attorneys for Complainant.
GAINSBURG & SOLOMON,
Attorneys for Defendant-Appellant.

(Endorsed:) Stipulation as to facts.

357 District Court of the United States for the Southern District of New York.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, as Members of the Firm of A. Fellerman & Son, Complainant,
against
NATIONAL DISCOUNT COMPANY et al., Def'ts-App'l'ts.

It is hereby stipulated and agreed between the attorneys for the respective parties hereto, that the record on appeal shall consist of the following papers; that the printing of all other papers now on file in the United States District Court shall be waived:

Citation; Petition on Appeal and Allowance; Assignment of Errors; Bill of Complaint; Answer of Defendant National Discount Co.; Complainant's Repulication; Judgment; Order Denying Motion for a New Trial; testimony adduced on the trial on the 8th, 9th, 10th and 11th days of December, 1908; Judge's charge to the jury and requests to charge; Plaintiff's Exhibits 9, 10, 11, 13, 14, 15, 16 and 17; Plaintiff's Exhibits A, B, C, D, E, F, G, H, I, K, L, M, N, O, P, Q, R, S, T, U and V; Stipulation containing substance of Plaintiff's Exhibits 1, 2, 3, 3, 4, 5, 6, 7, 8 and 12.

358 It is further stipulated and agreed that this stipulation shall be printed as part of the appeal record.

Dated New York, March 19th, 1909.

JAMES, SCHELL & ELKUS,
Attorneys for Complainant.
GAINSBURG & SOLOMON,
Attorneys for Def't-App'l't.

(Endorsed:) Stipulation as to record on appeal.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

ROBERT VAN IDERSTINE, Trustee in Bankruptcy of A. Fellerman, and Ano., Bankrupts, Plaintiffs-*Appellants*,
agst.
THE NATIONAL DISCOUNT COMPANY, Defendant-Appellant.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 26th day of April, in the year of our
359 Lord one thousand nine hundred and nine, and of the Independence of the said United States the one hundred and thirty.

[SEAL.] THOMAS ALEXANDER, *Clerk*.

The Clerk's fees for the certification of the record amount to one hundred and fifteen dollars.

THOS. ALEXANDER, *Clerk*.

360 United States Circuit Court of Appeals for the Second Circuit.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidor J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant-Appellee,
against
THE NATIONAL DISCOUNT COMPANY (Impleaded), Defendant-Appellant.

It is hereby stipulated that the transcript of record herein be amended by adding to the terms of the stipulation printed at pages 357 and 358, the following:

"And it is further stipulated that the printed transcript of record from page 21 to page 331, both inclusive, contains all the evidence oral and documentary so far as the latter is material, introduced by the parties in the United States District Court, and sets forth a complete transcript of the rulings and proceedings at the hearing of the cause before the Court and Jury.

And it is further stipulated that this stipulation shall be
361 printed and annexed to the appeal record as a part thereof.'

Dated, New York, October 16th, 1909.

JAMES, SCHELL & ELLIS,
Attorneys for Respondent.
GAINSBURG & SOLOMON,
Attorneys for Appellant.

Ordered accordingly,
E. H. LACOMBE,
U. S. C. J.

(Endorsed:) Van Iderstine v. Nat. Discount Co.—Stipulation and Order.—United States Circuit Court of Appeals, Second Circuit.—Filed Oct. 25, 1909.—William Parkin, Clerk.

362 United States Circuit Court for the Second Circuit, October Term, 1909.

Argued Nov. 16, 1909; Decided Dec. 7, 1909.

No. 79.

ROBERT VAN IDERSTINE, as Trustee, etc., Complainant-Appellee,
vs.
THE NATIONAL DISCOUNT COMPANY, Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe, and Noyes, Circuit Judges.

Appeal from a Decree of the District Court, Southern District of New York, in Favor of the Complainant, as Trustee in Bankruptcy of the Firm of A. Fellerman & Son.

Prior to August, 1905, the bankrupts, Fellerman & Son, were engaged in business as clothing manufacturers in New York City. The defendant was a Maine corporation doing business in New York and engaged chiefly in advancing money to merchants upon their outstanding customers' accounts.

On August 15, 1909, the elder Fellerman applied to the defendant for advancements upon his firm's accounts, and a written agreement was entered into wherein the defendant as "banker" agreed to advance to Fellerman & Son as "customer" seventy-five per cent. of the face value of such accounts as might be transferred to and accepted by it. The "customer" agreed to pay the "banker"
363 five per cent. commission upon the gross amount of the accounts pledged; to reimburse it for such outlays as exchange and postage, and to pay six per cent. interest upon advances. The contract contained other stipulations which are not of especial importance in the present case.

At the time of the execution of the contract the defendant advanced to Fellerman $3,000 in cash upon accounts amounting to $5,232.39, and on August 18 made a further advancement upon accounts amounting to $2,495.60. Of the latter advancement Fellerman actually received $1,006.33—the amount of the commissions upon the accounts being treated as a part of this advancement.

Before making the advances the defendant looked up the financial standing of Fellerman & Son in the mercantile agency reports and found them rated as being worth from $50,000 to $75,000—

with fair or good credit. With reference to that time, however, the reports were wholly inaccurate, Fellerman & Son being hopelessly insolvent.

Fellerman knew that his firm was insolvent at the time he pledged the accounts to the defendant. He used most of the money which he received in paying certain creditors whom he desired to prefer.

On August 19, 1905, a petition in involuntary bankruptcy was filed against Fellerman & Son and they were subsequently declared bankrupts. After the bankruptcy proceedings the defendant through an attorney collected upon the pledged accounts an amount in excess of the advancements upon them, and subsequently accounted to the trustee for the balance collected after deducting a small sum for interest and a large sum for attorney's fees.

The complainant as trustee in bankruptcy of Fellerman & Son brought a suit in equity in the District Court against the defendant to set aside as fraudulent the aforesaid transfers of accounts and to obtain an accounting. The District Court submitted the question of liability to a jury which found that the complainant was entitled to recover $4,767.76—that being the amount with interest which it was claimed that the defendant had actually received. The District Court adopted the finding of the jury as its own and entered a decree for the amount stated, from which decree the defendant has appealed.

364 NOYES, *Circuit Judge* (after making the foregoing statement):

Although this was a suit in equity it was tried in the District Court substantially in the manner of a common law action. The issues were submitted to a jury which brought in a general verdict. No particular questions were submitted and no special findings made. The Court accepted and adopted the verdict and entered a decree thereon.

We do not question the right of the District Court to obtain from jurors for its guidance general verdicts in equity causes. But we must point out that such verdicts are of little assistance to this Court in ascertaining the facts in the case upon appeal. Without any special findings we cannot tell, except by inference, what facts were or were not found. We must examine and weigh all the evidence in the record and determine whether, upon such evidence, the decree was right.

To sustain the decree we must be satisfied that the transfers of accounts from Fellerman to the defendant constituted fraudulent conveyances within the meaning of the Bankruptcy Act. Section 67*e* provides that "all conveyances, transfers, assignments or incumbrances of his property, or any part thereof made * * * a person adjudged a bankrupt * * * within four months prior to filing the petition with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them shall be

null and void as against the creditors of such debtor except as to purchasers in good faith and for a present fair consideration."

These elements then must necessarily appear in this case if the pledges of the accounts are to be held fraudulent:

(1) An intent upon the part of Fellerman & Son to hinder, delay or defraud their creditors.

(2) Want of good faith upon the part of the defendant.

Now while it is clear that Fellerman in pledging the accounts acted in view of insolvency, the evidence is not at all satisfactory that he intended to defraud his creditors as distinguished from obtaining the means for preferring particular creditors. It seems quite clear that the first money obtained from the defendant was used to pay a note at the bank. It also seems that most, if not all, the other money was used to pay favored creditors.

So far as Fellerman was concerned, the payments made with
365 the money obtained from the defendant were undoubtedly preferences. The money might have been recovered if the creditors had had reasonable cause to believe that preferences were intended. But there is no evidence that the payments were fraudulent. There is a marked distinction between a preferential payment and a fraudulent conveyance. Every preferential payment must to some extent hinder and delay creditors, but it is not necessarily a fraudulent conveyance. As said by the Supreme Court of the United States in the recent case of Coder v. Arts 213 U. S. 223:

"A consideration of the provisions of the bankruptcy law as to preferences and conveyances, shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect prescribed in Section 60 enabling one creditor to obtain a greater portion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view to obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference. In construing the Bankruptcy Act this distinction must be kept constantly in mind. As was said in Githens v. Shiffler, 112 Fed. Rep., 505: 'An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one.' In In re Maher, 144 Fed. Rep. 503-509, it was well said by the District Court of Massachusetts: 'In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors, which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual, the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him.'"

A preferential payment may be constructively fraudulent but it is not in and of itself a fraudulent conveyance. It can only become the latter in the unusual case where actual fraud in addition to the preferences is established. Thus a secret trust in favor

of a person making such payments might turn a mere preference into a fraudulent conveyance. But there is no proof in this case of any intent to hinder or defraud creditors more than the prefer-
366 ential payments in themselves would have hindered them. The language of Judge Sanborn in Sargent v. Blake, 160 Fed. 57, 61, is especially in point:

"The only way in which Maxwell could have made this payment in bad faith would have been to have made it in whole or in part in secret trust for himself, or with the actual intent to hinder or defraud the creditors of the company more than the mere payment of the debt * * * must necessarily have delayed or prevented their collection of their claims, and there was no evidence of any such trust or intent."

See also Coder v. Arts, supra.

If then there was no actual fraud upon the part of Fellerman in using the money obtained from the defendant in making preferential payments, it necessarily follows that there was no actual fraud in pledging the accounts to the defendant to obtain the money for such use. If a preference itself is not fraudulent as to creditors there can be no fraudulent intent in obtaining the money to make a preference.

The decision in ex parte Stubbins, L. R. 17. Ch. Div. 58, 68, with respect to the English bankruptcy act is applicable:

"But it is pressed upon us * * * that the transfer of goods to a purchaser for value with the view of using the purchase money for a voluntary preference, the purchaser knowing this intention was a fraudulent conveying away or transfer within the meaning of the sixth section of the Act. It appears to me that that view cannot be sustained. In truth a mere voluntary transfer impeachable only on the ground that it is a preference to a particular creditor has never been held to be, in itself, a fraud or an act of bankruptcy. It may be impeached on the ground that it is voluntary, but it is impossible, as it appears to me, to hold that a mere voluntary transfer is of itself an act of fraud, and if this is not fraudulent within any principle of law it would be equally impossible to say that a sale becomes fraudulent because there is an intention in the mind of the vendor to use the purchase money for the purpose of making a voluntary preference, and the purchaser knows that that is the motive of the sale and the intention of the vendor with reference to the proceeds of the sale."

Assuming, however, that a fraudulent intent on Fellerman's part appears, the other element of the complainant's case is lack-
367 ing. There is no tangible evidence to negative good faith on the part of the defendant. The complainant alleged, but failed to establish, that the defendant had full knowledge of Fellerman's fraudulent intention "and was not a purchaser in good faith of said accounts, nor did it pay a present fair consideration, but took said transfers with the intention to aid the consummation of said fraudulent scheme."

On the contrary, the defendant in making the loans did pay a present fair consideration and there is no affirmative evidence that

it took the transfers of accounts with the purpose of assisting Fellerman in an attempt to defraud his creditors. Substantially the only direct evidence showing any want of good faith upon the part of the defendant is the testimony that Levison suggested that Fellerman use the equity in the accounts to buy stock in the defendant corporation which could readily be turned over to members of his family. But the testimony concerning this statement is not wholly satisfactory. Moreover, if Levison made it as Fellerman testifies, it must have been made, according to the same testimony, in ignorance of the condition of Fellerman's affairs. Fellerman, when called by the complainant, testified that he did not disclose his financial situation to the defendant.

Practically all the complainant can urge is that the defendant was put upon inquiry by these circumstances:

(1) That Fellerman desired to obtain advancements upon his accounts.

(2) That, in order to obtain them, he acceded to onerous and oppressive terms.

We cannot say, however, that a desire to borrow money upon accounts is indicative of an intent to defraud creditors. From the defendant's point of view at that time it would seem that Fellerman's desire to secure advancements was quite as consistent with an intention to pay creditors, or, at least, to pay favored creditors, as it was to defraud creditors. And the fact that Fellerman was ready to agree to harsh and oppressive terms to obtain the money indicates Fellerman's need but hardly his fraudulent intent.

If, in view of the allegations of the complaint, the burden were upon the complainant to establish his allegation that the defendant was not a purchaser in good faith we think that he wholly
368 failed to do so. And even if the burden were upon the defendant to show its good faith, we are of the opinion that it sustained the burden.

The defendant undoubtedly took advantage of Fellerman's apparent necessities. But there was nothing in these necessities necessarily indicative of an intention to defraud—certainly nothing showing an intent to make a fraudulent conveyance as distinguished from a preference.

The decision of the District Court is reversed with costs and the cause remanded with instructions to dismiss the bill with costs.

William J. Wallace, for Appellant.
Abram I. Elkus, for Appellee.

369 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 17th Day of December, One Thousand Nine Hundred and Nine.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Walter C. Noyes, Circuit Judges.

ROBERT VAN IDERSTINE, as Trustee, etc., Complainant-Appellee,
vs.
NATIONAL DISCOUNT COMPANY, Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is reversed with costs and cause remanded with instructions to dismiss the bill with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.

370 Endorsed: United States Circuit Court of Appeals, Second Circuit. R. Van Iderstine vs. Nat. Discount Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 17, 1909, William Parkin, Clerk.

371 United States Circuit Court of Appeals for the Second Circuit.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidor J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant-Appellant,
against
NATIONAL DISCOUNT COMPANY, Defendant-Appellee.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of Robert Van Iderstine respectfully shows:

I. That he is trustee in bankruptcy of Abraham Fellerman and Isidor J. Fellerman, individually and as members of the firm of A. Fellerman & Son, and that he has duly qualified by the giving of the bond required of him.

II. That on or about the 23rd day of May, 1907, a bill of complaint in equity was filed in the office of the Clerk of the United States District Court for the Southern District of New York, which

said bill prayed for a decree adjudging that certain trans-
372 actions occurring between Abraham Fellerman and the National Discount Company be set aside as fraudulent and that the said National Discount Company be required to account to the trustee in bankruptcy for all moneys received from the transfer of certain outstanding accounts on the ground that the said transfers were made with the purpose of hindering, delaying and defrauding the creditors of Abraham Fellerman, Isidor Fellerman and the firm of A. Fellerman & Son.

III. Thereafter an answer was duly filed by the defendant and the cause came on for trial before the Honorable George C. Holt, District Judge, on the 8th day of December, 1908 at an Equity Term of the United States District Court for the Southern District of New York. The said Court impanelled a jury to aid it in the determination of the facts and the issues raised between the complainant and the defendant were submitted to the said jury. Thereafter and on or about the 11th day of December, the said jury found for your trustee as complainant on the issues so submitted and on January 4th, 1909, the said District Court accepted and adopted the finding of the said jury as its own and entered a decree requiring that the National Discount Company should pay over to your trustee the sum of four thousand seven hundred and sixty-seven and 76/100 ($4,767.76) dollars with interest and costs amounting in the aggregate to five thousand eight hundred two and 87/100 ($5,802.87) dollars.

373 IV. Thereafter and on or about the 18th day of January, 1909, the said District Court, after due deliberation, denied the motion of the defendant for a new trial.

V. That an appeal was taken from the said judgment to the United States Circuit Court of Appeals for the Second Circuit on the 18th day of December, 1909. The said Circuit Court of Appeals issued its mandate reversing the decree of the United States District Court with costs amounting to five hundred fifty-five and 04/100 ($555.04) dollars and directed that the bill of complaint filed by the complainant be dismissed with costs.

VI. In the said case, the trustee in bankruptcy alleged that a certain agreement entered into between the National Discount Company and A. Fellerman & Son on the 15th day of August, 1905 was made with intent to hinder, delay and defraud the creditors of A. Fellerman & Son and established that as a result of the said contract the defendant, the National Discount Company, had received the sum of four thousand seven hundred and sixty-seven and 76/100 ($4767.76) dollars. The trustee complainant alleged in his bill of complaint that outstanding accounts receivable amounting to seven thousand seven hundred twenty-seven and 89/100 ($7727.89) dollars were transferred to the National Discount Company for the sum of four thousand six and 33/100 ($4006.33) dollars as security for pretended advances. That on the said advances, the National
374 Discount Company had charged interest for forty (40) days amounting to eight hundred thirty-nine and 05/100 ($839.05) dollars.

The trustee further charged that at the time of the making of the said agreement and the transfer of the said outstanding accounts, the National Discount Company had reasonable cause to believe that the entire transaction was part of a fraudulent device and scheme on the part of A. Fellerman & Son to hinder, delay and defraud their creditors and that the National Discount Company became part of the said conspiracy in bad faith. The finding of the jury which was impanelled to aid the court and the adoption of this finding by the Court on the Trial of the said action, established the truth of the allegations of the bill of complaint.

VII. The Circuit Court of Appeals for the Second Circuit reversed the said decree of the District Court without the right to a new trial, the direction of the said Appellate Court being that the bills should be dismissed with costs.

IX. Your petitioner alleges that the mandate of the United States Circuit Court of Appeals for the Second Circuit, reversing the order of the District Court and directing the dismissal of the appeal, is erroneous and your petitioner feels aggrieved thereby and is desirous of obtaining a review by the Supreme Court of the United States of the said mandate upon errors assigned in the assignment of errors filed herein.

Now comes Abram I. Elkus and petitions this Court for an order allowing your petitioner to prosecute an appeal from the said
375 final order of the United States Circuit Court of Appeals, to the Supreme Court of the United States under and in accordance with the laws of the United States in such behalf made.

Your petitioner is advised by counsel that there are grave doubts that the judgment and mandate of the United States Circuit Court of Appeals is a valid judgment and your petitioner is advised that grave errors of law have been committed by the said court.

Wherefore, your petitioner prays that an appeal may be allowed and a citation be issued for the review of the said judgment and mandate of the United States Circuit Court of Appeals for the Second Circuit to the Supreme Court of the United States and that a transcript of the proceedings and papers upon which said mandate and judgment were made, duly authenticated, may be sent to the Supreme Court of the United States at Washington for its determination as to the matters involved in the said appeal and your petitioner will ever pray.

Dated: New York, January 11th, 1910.

ROBERT VAN IDERSTINE,
Petitioner.

ABRAM I. ELKUS,
ABRAM I. ELKUS,
Solicitor for Petitioner.

376 The foregoing petition for appeal is allowed this 15th day of January, 1910.

H. G. WARD,
Judge United States Circuit Court of Appeals, Second Circuit.

377 CITY AND COUNTY OF NEW YORK, *ss:*

Robert Van Iderstine being duly sworn, says that he is complainant appellant in this action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ROBERT VAN IDERSTINE.

Sworn to before me this 14th day of Jan., 1910.

LOUIS LORENCE,
Notary Public, Kings County.

Certificate filed in New York County.

378 Endorsed: U. S. Circuit Court of Appeals, Second Circuit. Robert Van Iderstine, as Trustee, etc., Complainant against National Discount Co., Defendant. (Copy.) Petition for appeal. James, Schell & Elkus, Attorneys for Complainant, 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 15, 1910. William Parkin, Clerk.

Please take notice that the within is a copy of — this day duly entered and filed in the within entitled action in the office of the Clerk of the — in the Borough of Manhattan, in the City of New York.

Dated New York, —— —, 1—.

Yours, &c., JAMES, SCHELL & ELKUS,
Attorneys for —.

170 Broadway, Borough of Manhattan, New York City.

To —— ——, attorney for —— ——.

379 United States Circuit Court of Appeals for the Second Circuit.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidor J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Complainant-Appellant,

against

NATIONAL DISCOUNT COMPANY, Defendant-Appellee.

Now comes Robert Van Iderstine, as trustee of Abraham Fellerman and Isidor J. Fellerman, individually and as members of the firm of A. Fellerman & Son, appellant and complainant in error by Abram I. Elkus, his solicitor, in connection with his petition for appeal to the Supreme Court of the United States from a mandate of the Circuit Court of Appeals for the Second Circuit, entered on the 18th day of December, 1909, and says that in the record of the proceedings in the United States Circuit Court of Appeals there is manifest error and he makes and files the following assignment of errors:

I. That the said Court erred in reversing the decree of the District Court finding that the complainant was entitled to recover from the defendant the sum of five thousand eight hundred two and 87/100 ($5802.87) dollars.

380 II. That the said Court erred in reversing the said decree with instructions to dismiss the bill with costs, said error being for failure to instruct that the complainant be granted a new trial.

III. That the said Court erred in deciding as a matter of law that the pledging of accounts of A. Fellerman & Son to the National Discount Company when the bankrupt was hopelessly insolvent and as part of a series of transactions by which all the outstanding accounts of the bankrupt were pledged to various persons was not a transfer with the intent to hinder, delay and defraud creditors because a large portion of the money obtained from the transfers was used to pay favored creditors.

IV. That the Court erred in deciding as conclusion of law that the transfer of practically all of the insolvent's property cannot be regarded as a fraudulent transfer because a portion of the moneys received were used to prefer certain creditors.

V. That the said Court erred in regarding the ultimate disposition of the funds realized from a transfer by the bankrupt as negativing a fraudulent intent in the mind of the bankrupt at the time of the making of the said transfer and prior to any disposition of the said moneys.

VI. That the Court erred in failing to find that the bankrupt who transferred the major portion of his property to the National

381 Discount Company, Charles Stich and Samuel Gordon within a week of the filing of the petition in bankruptcy leaving to his creditors less than ten per cent of the amount of their claims was not engaged in a transaction which had for its intent the hindering, delaying and defrauding of creditors because two or three relatives received the proceeds obtained from the said transfers.

VII. That the said Court erred in overruling the finding of the District Judge sitting in equity that fraud was established on the part of the bankrupt, said finding having been submitted to a jury impanelled to aid the conscience of the Court and having been passed upon by the District Judge who tried the said cause independently and he, having adopted the finding and the said facts having been again submitted for further consideration on a motion for a new trial.

VIII. That the said Circuit Court of Appeals was without jurisdiction to reverse the findings of fact made by the District Court and the jury who saw and heard the witnesses when there was evidence before both the said jury and the said District Judge from which the inference might be drawn that the bankrupt had a fraudulent intent at the time of the making of the said transfer.

IX. That the Circuit Court of Appeals had no jurisdiction to reverse the findings of fact of the District Judge and the jury who

382 saw and heard the witnesses when there was evidence in the record from which the said jury and District Court could infer that at the time of the accepting of the said transfer,

the defendant had facts brought to its notice sufficient to have put a reasonably prudent man upon inquiry that a fraud was being consummated.

X. That the said Court erred in finding that the defendant, the National Discount Company, gave a present fair consideration for the said transfer, the undisputed facts being that the said defendant paid four thousand six and 33/100 ($4006.33) dollars, a grossly inadequate consideration for property amounting to 7727.89.

XI. That the said Court erred in overruling the findings of fact by the District Judge and the jury who saw and heard the witnesses that the National Discount Company had facts brought to its attention which would put a reasonable man upon inquiry that a fraud was being perpetrated when upon the conceded facts the National Discount Company found a man who was rated in the mercantile agency reports as worth from fifty to seventy-five thousand dollars with fair or good credit would consent to the execution of a contract which was onerous and burdensome and which warranted a charge on the part of the said defendant of interest that amounted in excess of fifty per cent.

XII. That the Circuit Court of Appeals erred in finding that the defendant who "took advantage of this bankrupt's apparent necessities" and forced upon this bankrupt an onerous and burden-
383 some contract which permitted it to extort usurious interest did not have facts brought to its attention sufficient to put a reasonable man upon inquiry as to whether a fraud was being perpetrated.

XIII. That the Circuit Court of Appeals erred in failing to find that the complainant established a case which will warrant recovery in an action brought to set aside a fraudulent transfer where facts are proved and brought to the attention of the defendant which would have put a reasonably prudent man upon inquiry and the said inquiry would develop the fact that a fraud was being perpetrated.

XIV. That the Circuit Court of Appeals erred upon the facts established in the case in overruling the findings of fact of the jury and the District Judge before which the case was tried.

XV. That the Court erred in failing to direct the return of the usurious interest exacted in excess of the actual advances made.

XVI. That the Court erred in failing to find that the motion made by the defendant for a new trial waived any right to have the case remanded with directions to dismiss the appeal and the said Court erred in failing to regard the said motion for a new trial as a waiver of any right to insist that no facts had been submitted
384 to the jury and the District Court which would warrant a verdict.

By reason whereof, your petitioner prays that the said mandate of the United States Circuit Court for the Second Circuit be reversed and that the decree of the United States District Court for the Southern District of New York, made on the 4th day of January, 1909, be affirmed and that the proceedings be remanded *of* the United States District Court for the Southern District of New York

with a direction that the said United States District Court for the Southern District of New York enter its decree finding that the transfer of outstanding accounts made by A. Fellerman & Son to the National Discount Company be deemed to be fraudulent and that your petitioner, as trustee, recover from the National Discount Company the sum of five thousand eight hundred two and 87/100 ($5802.87) dollars with costs and interest from the 4th day of January, 1909, or in the alternative, that the said proceedings be remanded *of* the United States District Court for the Southern District of New York with a direction that the said cause shall be retried with costs to abide the event.

ROBERT VAN IDERSTINE,
Complainant, Appellant.

385 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

Robert Van Iderstine, being duly sworn, says that the foregoing assignment of error is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matter- he believes it to be true.

ROBERT VAN IDERSTINE.

Sworn to before me this 14th day of Jan., 1910.

LOUIS LORENCE,
Notary Public, Kings Co.

Certificate filed in New York County.

386 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Robert Van Iderstine as Trustee, Complainant-Appellant, vs. National Discount Co., Defendant-Appellee. Copy. Assignment of Errors. James, Schell & Elkus, Solicitors for Complainant-Appellant, No. 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 15, 1910. William Parkin, Clerk.

[Endorsed.]

Notice of Entry.

SIR: Please take notice that the within is a copy of —— duly entered and filed in the office of the Clerk of the District Court of the United States, for the Southern District of New York, on the — day of ——, 19—.

Dated, New York, —— —, 19—.

Yours, &c., JAMES, SCHELL & ELKUS,
Solicitors for —— ——,
No. 170 Broadway, Borough of Manhattan, New York City.

To —— ——, solicitor for —— ——.

Notice of Settlement.

SIR: Please take notice that an order of which the within is a true copy will be presented for settlement and entry herein to Hon. —— ——, Judge of the District Court of the United States for the Southern District of New York, at his Chambers in the Post Office Building, in the Borough of Manhattan, in the City of New York, on the — day of ——, 19—, at 10:30 o'clock in the forenoon.

Dated, New York, —— —, —.

Yours, &c., JAMES, SCHELL & ELKUS,
Solicitors for —— ——,
No. 170 Broadway, Borough of Manhattan, New York City.

To —— ——, solicitor for —— ——.

To —— ——, attorney for —— ——.

387 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 386 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Robert Van Iderstine, as Trustee, etc., against National Discount Company as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 17th day of January in the year of our Lord One Thousand Nine Hundred and ten and of the Independence of the said United States the One Hundred and thirty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

388 By the Honorable Henry G. Ward, Circuit Judge, one of the Judges of the United States Circuit Court of Appeals, Second Circuit.

The President of the United States to the National Discount Company, Greeting:

You are hereby cited and admonished to appear before the Supreme Court of the United States to be held in Washington, District of Columbia, on the 14th day of February, 1910, pursuant to an appeal from the judgment and mandate of the United States

Circuit Court of Appeals made on the 18th day of December, 1909, reversing the decree of the United States District Court for the Southern District of New York made on the 4th day of January, 1908, adjudging that The National Discount Company pay to the trustee in bankruptcy the sum of five thousand eight hundred two and 87/100 ($5802.87) dollars in which appeal, Robert Van Iderstine, as trustee in bankruptcy of Abraham Fellerman, and Isidor J. Fellerman, individually and as members of the firm of A. Fellerman & Son is the appellant and you are appellee, to show cause, if any there be, why the said judgment and mandate of the United States Circuit Court of Appeals should not be reversed and corrected and why speedy justice should not be done in that behalf.

389 Given under my hand in the City of New York in the Southern District of New York this 15th day of January, in the year of our Lord nineteen hundred and ten and of the Independence of the United States the one hundred and thirty-fourth.

H. G. WARD,
One of the Judges of the Circuit Court of Appeals of the United States for the Second Circuit.

CITY AND COUNTY OF NEW YORK, *ss:*

—— ——, being duly sworn says that he is —— the —— in this action; that he has read the foregoing —— and knows the contents thereof; that the same is true of — own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

—— ——.

Sworn to before me this — day of ——, 1—.

—— ——.

390 [Endorsed:] U. S. Circuit Court of Appeals, Second Circuit. Robert Van Iderstine, as Trustee, etc., Complainant-App., against The National Discount Co., Defendant-Appellee. (Original.) Citation. James, Schell & Elkus, Attorneys for Complainant-Appellant, 170 Broadway, Borough of Manhattan, New York City. Copy received Jan. 15th, 1910. I. Gainsburg, Att'y for Def't; I. Gainsburg, Att'y for Def.-Appellee. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 15, 1910. William Parkin, Clerk.

[Endorsed.]

Please take notice that the within is a copy of Citation this day duly entered and filed in the within entitled action in the office of

the Clerk of the U. S. Circuit Court of Appeals, Second Circuit, in the Borough of Manhattan, in the City of New York.

Dated, New York, Jan. 11, 1910.

Yours, &c., JAMES, SCHELL & ELKUS,
Attorneys for Complainant-Appellant,
170 *Broadway, Borough of Manhattan, New York City.*

Due service of a copy of the within is hereby admitted.
Dated, New York, —— —, 1—.

Endorsed on cover: File No. 22,316. U. S. Circuit Court Appeals, 2d Circuit. Term No. 695. Robert Van Iderstine, trustee in bankruptcy of Abraham Fellerman and Isidor J. Fellerman, individually and as members of the firm of A. Fellerman & Son, appellant, vs. The National Discount Company. Filed September 17th. 1910. Filed No. 22,316.

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RECEIVED
DEC 10 1912
JAMES H. MAHENNEY,
Clerk.

In the Supreme Court of the United States.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of ABRAHAM FELLERMAN and ISIDOR J. FELLERMAN, individually and as members of the firm of A. FELLERMAN & SON,

Appellant,

vs.

THE NATIONAL DISCOUNT COMPANY,

Appellee.

October Term, 1912.
No. 136.

BRIEF FOR APPELLANT.

ABRAM I. ELKUS,
GARRARD GLENN,
Counsel for Appellant.

WM. WILBUR, Law Printer, 149-155 West 4th St., New York.

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IN THE

Supreme Court of the United States.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of ABRAHAM FELLERMAN and ISIDOR J. FELLERMAN, individually and as members of the firm of A. Fellerman & Son, *Appellant*, *vs.* THE NATIONAL DISCOUNT COMPANY, *Appellee.*	October Term, 1910. No. 695.

BRIEF FOR APPELLANT.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit, which reversed a decree of the District Court for the Southern District of New York, and directed that the appellant's bill of complaint herein be dismissed, with costs (Rec., pp. 259-261).

The bill of the appellant (then plaintiff) sought to set aside certain transactions, whereby the appellee (then defendant), on the eve of the bankruptcy, pretended to lend to the bankrupts $4,000 on the security of accounts receivable aggregating $8,000, as being in

fraud of the bankrupts' creditors (Rec., pp. 1-7). The appellee answered, denying the fraud (Rec., pp. 7-10). Proofs were taken for four days in open court before the presiding Judge (HOLT, J.) and a jury which was empanelled to aid the Court in a determination of the disputed facts. The learned Judge, in his instructions to the jury, set forth his views of the law, leaving to the jury the issues of fact thereunder (Rec., pp. 188-199). The jury determined these issues in the appellant's favor (Rec., p. 199). A decree was then entered, which, after reciting that the Court adopted the jury's finding of fact as its own, adjudged that the appellants recover the principal amount of $4,767.76, with interest and costs (Rec., pp. 240-1).

Prior to the entry of this decree, and immediately after the jury rendered its verdict, the appellee moved for a new trial before another jury on the ground that the verdict was against the weight of evidence, was against the law, and excessive (Rec., p. 199). This was denied (Rec., p. 199), and an order was later entered to that effect (Rec., pp., 241-2).

The defendant (now appellee) then appealed from both the decree and the order (Rec., pp. 242-251). The Circuit Court of Appeals concluded that the facts appearing by the proofs did not support the decree (Rec., pp. 254-8). But notwithstanding that the appellee had merely asked for a new trial, the learned Appellate Court not only reversed the decree appealed from, but directed that the bill should be forthwith dismissed (Rec., pp. 258-9). From that decree this appeal is taken.

The position of the appellant, broadly speaking, is as follows :

(1) The evidence supports the decree, and the findings of fact by the Judge and a jury, who for four days had the witnesses under observation, should not have been disturbed by an Appellate Court unless the Judge misconceived the law applicable to the case.

(2) The learned Judge did not err in his views of the law with which he guided the jury's deliberations.

(3) Even were it otherwise, the Appellate Court should not have directed the bill's dismissal, but should have directed a new trial, as requested by the appellee.

Before discussing these points, however, it would be well to review the case as it appeared on the pleadings and proofs.

Statement of Facts.

The appellant is the trustee in bankruptcy of Abraham Fellerman and his son, Isidor Fellerman, who were engaged in the cloak and suit business in New York City (Rec., p. 27). A. Fellerman had general charge of the business. I. Fellerman was outside man and Bella Fellerman, a daughter, kept the books (Rec., p. 28).

On August 15th, 1905, the firm was insolvent. It owed $38,000 and there was owing to it $12,000 (Rec., pp. 52-3).

Its tangible property, including merchandise and fixtures, amounted to $5,824.99 net, according to the appraisers who examined it subsequently to its coming into the possession of the receiver in bankruptcy (Rec., p. 15).

The appellee is a Maine corporation with $500,000 of preferred stock and $500,000 of common stock authorized. Of this stock $75,000 of preferred and $75,000 of common had been issued, and B. Levison, Jr., owned 85 per cent. of the amount issued, and was the president of and controlled the corporation (Rec., pp, 97, 120, 129). Mr. Levison claims that by its charter the corporation was organized to conduct a banking business and discount accounts (Rec., p. 105).

Fellerman told an acquaintance of his named Max Solomon that he was short of money; and Solomon, on the morning of August 15th, 1905, took him to the office of the National Discount Company and introduced Fellerman to Levison (Rec., pp. 28, 86-7, 107).

Fellerman stated to Levison that he was very short and needed money and asked if he could borrow some money on accounts. Levison said yes, if the accounts were good (Rec., p. 29).

Levison produced a form of contract which his concern used and read it to Fellerman. Fellerman, who can only read and write his name and his firm name (Rec., pp. 46, 161), states that he does not know whether Levison read it all to him or not (Rec., p. 46). He does remember that Levison said he would advance seventy-five cents on the dollar on the accounts and would charge six per cent. (Rec., pp. 46-7).

Fellerman says he does not remember whether he signed the agreement at Levison's office or at his own office, but he does remember signing it on that day (Rec., p. 46). Fellerman says he told Levison nothing about his financial condition (Rec., pp. 47-8).

At this first conversation the question came up as to what should become of the balance of the accounts over the advances made by the appellee, and Levison said, according to the appellant's evidence :

> " You can buy shares of my company for the amount that would be left, and you can then transfer them afterwards to anyone that you want. They are good for anybody " (Rec., p. 60).

Fellerman adds that Levison at the same time told him that he could transfer this stock in the National Discount Company to his wife or daughter (Rec., pp. 60, 30-1, 52, 39).

The agreement signed by Fellerman is on a printed form prepared by the defendant (Exhibit 10, Rec., p. 204). In it the appellee is continually referred to as the " banker " and Fellerman & Son as the " customer." It recites that the customer is desirous of realizing cash on all accounts, so the " banker " agrees to secure funds and advance same to the customer from time to time, to the extent of per cent. of the net value of such accounts as may be accepted by the " banker " upon the following terms:

The customers *may* submit all their orders to the " banker " for approval of credit.

The customer shall deliver original and duplicate invoices for goods sold and delivered with original shipping receipt and an assignment of the account ; the " banker " reserves the right to give or cancel his approval of the whole or any part thereof. If the " banker " disapproves of an order, the customer may fill the order, but must then assign the account to the " banker " as general security for all obligations to the " banker."

All accounts are held as general security for all advances, claims, debts and demands due or to become due.

The "banker" is empowered to endorse checks, notes, etc., to the customer's order.

All expenses incurred in the collection of accounts are to be charged to the customer.

The customer agrees to pay six per cent. on all moneys advanced.

The customer agrees not to procure advances from any other source. The "banker" is to receive a commission of five per cent. on the *gross* amount of accounts of the customer.

In brief, the agreement was one under which the "banker" was not bound to do anything and the customer was bound to do everything. The banker was to receive six per cent. on the moneys he advanced and a commission of five per cent. on the gross total of the accounts assigned and all expenses for collection, etc.

After the first conversation with Levison, Fellerman returned to his office to get the statements (Rec, p. 30). Levison sent Lewis, an employee of the defendant, to Fellerman's office. Bella Fellerman testified that Lewis asked for the ledger, made out the statements of the accounts, put a stamp on each page where an account appeared which was to be transferred to the defendant, took bill-heads of the firm and left (Rec., pp. 34-5).

The accounts upon which duplicates and assignments were taken and upon which the stamp was put amounted to $5,232.39 (Rec., pp. 108, 34-5).

Fellerman then returned to appellee's office and had a second interview with Levison.

Fellerman was paid $3,000 in a check made to his order which he says was endorsed by him and sent by Levison to the bank and the cash brought to him (Rec. pp. 30-2). Fellerman asked for cash, telling Levison that he was short of money; that his creditors were pushing him and that he needed money to pay them; that he had no money in the bank; that he had a note of $3,000 to pay off and that he must pay it the next day or the same day (Rec., pp. 31, 32).

The check of $3,000 is Defendant's Exhibit I (Rec., p. 226).

The note for $3,000 which Fellerman paid was one made by him and endorsed by his son-in-law, Levine (Rec., pp. 31, 33, 50, 151, 156, 161).

On the 18th of August Fellerman again went to the office of the appellee and took with him accounts of the value of $2,495.60 (Rec., pp. 113, 33). Fellerman says he was given $1,000 in cash at this time (Rec., p. 39).

De Bolt, at that time the secretary of the appellee, testified that the amount given to Fellerman in cash at that time was $1,000.22 (Rec., p. 175).

The appellee took receipts from Fellerman for $1,392.73 (Rec., pp. 170-1, *Defendant's Exhibits G and H*, Rec., p. 226).

Levison explains the excess amount shown in the receipts by saying that they credited Fellerman with payment of the five per cent. commission on the gross amount of all the accounts, amounting to $386.40 (Rec., pp. 170-1). The page of appellee's cash book showing this transaction is Defendant's Exhibit U (Rec., p. 239).

On the 19th of August, 1905, an involuntary petition in bankruptcy was filed against A. Fellerman & Son.

On the same day the appellant was appointed temporary receiver, and duly qualified as such.

On the 21st day of September, 1905, the members of the firm of A. Fellerman & Son were adjudicated bankrupts individually and as members of the firm, and thereafter the appellant was duly elected trustee (Rec., pp. 251-2).

By September 27th, the appellee had collected $4,241.42 on these accounts (Rec., p. 220), which is more than the amount it had given Fellerman upon them. This was but forty days after the first transaction.

Efforts were made by the trustee to discover the exact transaction, and about the 30th day of November, 1906, the appellee rendered an account in which it claimed to have advanced $4,470.35 in cash, on which it charges attorney's collection fees of $344.77, interest of $18.17, and sundries of $12.09, and said that it had collected in cash $5,612.71, leaving a balance of $767.33 of cash over their advances. The amount of the various charges made by the appellee above the $4,000.22 which it actually paid to Fellerman is exactly $845.16 (*Defendant's Exhibit F*, Rec., p. 225).

On the 21st of February, 1907, the alleged balance above advances and charges of $767.33 was paid by the appellee to the trustee pursuant to an order of the District Court (Rec., pp. 16, 121).

It subsequently appeared that the words, "attorney's fees," were not included in the contract actually signed by Fellerman, although a printed form with the words

"attorney's fees" included in it had been furnished by Levison to the attorneys for the trustee (Rec., pp. 132-3).

Summary of Points and Assignments of Error.

1. *At the time of the transfers the bankrupts were insolvent and knew it.*

This, and the point next following, deal with the same assignments of error.

2. *The bankrupts' dealings with the appellee were part of a scheme of the bankrupts to convert their slow assets into cash, with parts of the amount realized to prefer favored creditors, and to appropriate the balance to their own use, to the exclusion of their remaining creditors.*

This deals with the third, fourth and sixth assignments of error (Rec., p. 263).

3. *The appellee was not a transferee in good faith.*

This point is covered by the tenth, eleventh, twelfth and thirteenth assignments of error (Rec., p. 264).

4. *A conveyance may be fraudulent as against creditors even though it is made for an actual consideration or loan.*

This and the next point concern the same assignments of error.

5. *In determining whether the conveyance is fraudulent the chief factor is the intended disposition of the consideration.*

These two points touch on the third, fourth and sixth assignments of error (Rec., p. 263).

6. *As part of the money the bankrupts received from the appellee they applied to their own uses, the decree of the Circuit Court of Appeals is clearly erroneous to that extent.*

This is covered by the third and fourth assignments of error (Rec., p. 263). It is, indeed, such a "plain error" that it should be noticed, even had it not been assigned.

7. *Though the bankrupts used $3,000 of the funds received from the appellee to prefer a favored creditor, the transaction is none the less fraudulent.*

This again deals with the third, fourth and sixth assignments of error (Rec., p. 263).

8. *The Circuit Court of Appeals erred in refusing to grant a new trial instead of dismissing the bill.*

This deals with the second, seventh, eighth, ninth (Rec., p. 263), fourteenth and sixteenth (Rec., p. 264) assignments of error.

POINT I.

At the time of the transfers the bankrupts were insolvent and knew it.

This cannot be disputed. The learned District Judge in charging the jury thus summed up the evidence :

"The evidence upon that subject is in substance

the evidence of the daughter that A. Fellerman & Son owed about $38,000 on the 15th and about $31,000 on the 18th, and that there was due to them about $12,000 in debts. The Trustee testifies that the total amount of the assets, that is the appraised amount of the assets, was $5,000, a little over $5,000; and that the total amount that he has collected is between $9,000 and $10,000, and, of course, some of those collections were debts which the daughter put in as among the $12,000 that were due; so that upon the evidence the highest amount from any point of view that you can figure on the value would be $12,000 and $9,000, which is $21,000 as against an indebtedness of $31,000. Of course it is for you to say under the circumstances whether the Fellermans were insolvent at the time, but I should not suppose you would have much difficulty with that branch of the case" (Rec., p. 190).

The Circuit Court of Appeals in its opinion says:

"With reference to that time, however, the Mercantile Agency reports were wholly inaccurate; Fellerman & Son being hopelessly insolvent. Fellerman knew that his firm was insolvent at the time he pledged the accounts with the defendant" (Rec., pp. 254–255).

POINT II.

The bankrupts' dealings with the appellee were part of a scheme by the bankrupts to convert their slow assets into cash, with part of the amount received to prefer favored creditors, and to appropriate the balance to their own use, to the exclusion of their remaining creditors.

The transfer of the accounts by the bankrupts to the appellee was effected in two instalments. On August 15th, 1905, the bankrupts transferred accounts

aggregating $5,232.39 (Rec., p. 69), and, on August 18th accounts aggregating $2,395.50 (Rec., p. 69). On the occasion of the first transfer the bankrupts received from the appellee $3,000 (Rec., p. 30). For the second transfer the bankrupts received $1,000 (Rec., p. 32). Thus the total amount received by the bankrupts for the transfer of accounts, aggregating nearly $8,000, was $4,000.

On each occasion when the elder Fellerman received an advance he asked for it on the ground that he had a note to pay off which was in the Bank.

This representation was true on the first occasion. The bankrupt received $3,000 and with it paid off a note for that amount (Rec., pp. 50-51). This note was made by the bankrupts (Rec., p. 31), and the endorser thereon was one Levine (Rec., p. 50), who was Fellerman's son-in-law (Rec., p. 31). But the $1,000 which the bankrupt received on the second occasion, August 18th, was not so used. The learned District Judge, speaking of this matter, said :

> " With $3,000 he paid off the note to which his son-in-law, a relative, was a party, and the other $1,000 was also used, as I recollect it, to pay obligations " (Rec., p. 190).

The Circuit Court of Appeals in speaking of this said :

> " It seems quite clear that the first money obtained from the defendant was used to pay a note at the Bank. It also seems that most, if not all, of the other money was used to pay favored creditors. So far as Fellerman was concerned the payments made with the money obtained from the defendant were undoubtedly preferences " (Rec., p. 256).

It is not true, however, that the second instalment of $1,000 was used to pay any creditors. The learned Courts below confused this with the disposition made of other moneys procured from other persons by similar means at the same time.

This brings up the facts in regard to other transfers of the bankrupts' property which were practically contemporaneous with the transfers to the appellee. This matter is referred to in the 4th, 5th, and 6th assignments of error (Rec., p. 263), which touch on the assignments to Gordon and Stich as well as the transfers to the appellee, which are the immediate subject of the present suit. These transfers to Gordon and Stich, respectively, covered all the balance of the accounts receivable, and these constituted the bankrupts' major asset.

The uncontradicted testimony of the bankrupt Fellerman on this head is as follows :—On August 18, 1905, soon after the last of his dealings with the appellee, he met one Gordon in a bar. He did not know Gordon (Rec., p. 41), but somebody had recommended him for the purpose in hand (Rec., p. 42). As a result of their bar-room rendezvous, the bankrupts transferred to Gordon, for $900 cash, the equity in the accounts which had been pledged to the appellee (Rec., p. 41). Abner Woerblin, Fellerman's son-in-law, a law student, drew up the assignment (Rec., p. 41).

From his deal with Gordon, Fellerman hurried to a meeting with one Stich. To this man he sold the accounts receivable which had not been included in the assignments to the appellee and Gordon, for $3,000 in

a check. This check he cashed early the following morning, the day of the bankruptcy (Rec., pp. 43–4, 36).

With the money obtained from Stich and Gordon, Fellerman says he paid $1,000 to Leonard Bronner, the lawyer who represented him in the bankruptcy proceedings instituted on that day (Rec., p. 81), paid $1,500 to his hands, and paid one Beyer, a "confidential" creditor, $500 (Rec., pp. 43–4).

The balance he cannot account for, nor does he account or attempt to account for the $1,000 received from the defendant on the 18th (see Rec., p. 40). The trustee never got it (Rec., pp. 14–16) and the creditors never got it.

Then the petition in bankruptcy was filed, and a receiver was duly appointed. The receiver found nothing but $5,824.99 worth of goods (Rec., p. 15). The bankrupts had destroyed all their books and records (Rec., p. 14) and the Court punished them for so doing (Rec., p. 44).

The trustee afterward sued Gordon and Stich, respectively, for their parts in these transactions. He recovered $2,000 from Stich and $500 from Gordon (Rec., pp. 15–16).

A strenuous effort was made by the defendant to have the Court disregard the Gordon and Stich transfers. Fellerman, it is true, testified that he told the appellee nothing about these transfers then in contemplation, and denies that the defendant had anything to do with them. (Rec., pp. 44–5).

But Fellerman's testimony cannot be entirely relied

upon. He had previously been committed for contempt in giving false testimony in other proceedings in his bankruptcy (Rec., pp. 44–5). It was necessary for the plaintiff to call him, but the weight and [illegible] of the different portions of his testimony were for the Court and jury. Judge HOLT, who has had valuable experience in this class of cases, appreciated this fact, as was evidenced in his charge to the jury: "You should bear in mind," he says, "that the trustee in bankruptcy is at a considerable disadvantage in such a case. He usually knows nothing personally about the facts; he stands as a trustee for creditors, but all the transactions took place before he came into the case, and if the charge is correct, and if it is a case where there has been *collusion* between the bankrupt and a man to buy his property for less than it was worth, and in that way to help the bankrupt to turn it into cash so that he can more easily conceal it or apply it to such purposes as he wants, in such a case as that it is difficult for a trustee to get his evidence" (Rec., p. 194).

The evidence concerning the Stich and Gordon transactions was clearly admissible to show the fraudulent intent of the Fellermans in the contemporaneous transaction with the appellee.

Benedick vs. *Gill* (2 McCrary, C. C. Rep., 486).
Fraser vs. *Levy* (6 H. & N., 15).
Delaware vs. *Ensign* (21 Barb., 85).

The destruction of the bankrupts' books and records is likewise a strong badge of fraud on their part.

Benedick vs. *Gill* (2 McCrary C. C., 486).

This point is very clearly brought out by the New York Court :

> " The wholesale nature of the transaction—selling goods then but recently purchased and not yet received—including debts not examined on inventory; * * * emphatically indicate a dishonest purpose."
>
> *Delaware* vs. *Ensign* (21 Barb., 85, 88).

The question was clearly presented in the English case cited. There BLACKBURN, J., at the trial allowed evidence that the bankrupt had likewise sold goods to other persons and concealed the proceeds from his creditors. On rule for a new trial this ruling was upheld.

Fraser vs. *Levy* (6 H. & N., 15).

So far as Fellerman is concerned, therefore, we have a complete case of fraud upon his creditors. In the beginning he is insolvent. His accounts receivable are his major asset. The greater part of them he hypothecates to the appellee. Part of the money he received he uses to prefer a creditor. The balance he is still secreting from his creditors. Then, on the same day, he turns the equity in these pledged accounts into more cash. He also sells his remaining accounts for cash. Part of this money he uses to pay a lawyer to represent him in his impending bankruptcy, another part he uses to prefer another creditor, and the balance he is still secreting from his creditors.

The next question is whether the appellee, on its part, acted in good faith.

POINT III.

The appellee was not a transferee in good faith.

The burden of the appellee's argument on the facts was that Fellerman did not say that he intended to defraud his creditors, and that no agreement to that effect appears. Perhaps the shortest answer to this is the following language of CALDWELL, J.:

> "An actual agreement or conspiracy between Jacobs and Thompson that the latter would aid the former to defraud his creditors does not have to be shown. It is sufficient to avoid the sale if the facts and circumstances within the knowledge of Thompson are such as fairly to induce the belief of the fraudulent purpose of Jacobs, or if, having a good reason to suspect it, he purposely refused to make inquiry and remained wilfully ignorant."
>
> *Singer* vs. *Jacobs* (11 Fed., 559).

All the evidence in the case, and particularly that of Levison, the appellee's president, general manager and owner, shows the guilty knowledge of the defendant. The following is submitted as a fair review of the appellee's actual participation in the bankrupt's scheme:

A. THE MEETING OF AUGUST 10TH.

Levison testifies that he first met Fellerman on either August 10th or 11th, 1905 (Rec., p. 105). Fellerman called alone and introduced himself. Their full conversation is detailed by Levison (Rec., pp. 106–7) and is to

the effect that Fellerman's business required such an adjunct as a system of loans upon his accounts receivable. Levison required time to look to ascertain the nature and situation of Fellerman's business. Fellerman took home a copy of the proposed contract to look over.

Fellerman denies that he ever saw Levison prior to August 14th (Rec., p. 28). And its noteworthy that when he did call on August 14th, he was introduced by one Solomon, a stockholder in the appellee company (Rec., pp. 86 *et seq.*). Solomon testifies that Fellerman approached him on the morning of that day and asked where he could borrow some money. Solomon advised Fellerman to see the appellee. Fellerman requested Solomon to go with him (Rec., pp. 86-7). Although Solomon recalls an alleged remark of Fellerman " that he had been there before " (Rec., p. 87), nevertheless, when they arrived at the defendant's office Solomon introduced Fellerman to Levison (Rec., p. 94). And Solomon would not say that Levison remarked that he had ever seen Fellerman before (Rec., p. 94).

If Levison is to be believed, Fellerman asked for an arrangement whereby the appellee should take over the care and collection of all of his accounts and sales, and give him any advice that he, from time to time, should need. Levison agrees to do this, but as per the the terms of a written agreement whereby he was obligated to do no such thing. The agreement speaks for itself (Exhibit 10, Rec., p. 204) and more eloquent even than that is Levison's discussion of this point on his cross-examination (Rec., pp. 130-2). The most absurd

touch of all, however, is where Levison suggests that Fellerman take this contract home and consult his son about it. If he had tried to snap Fellerman, an illiterate man (Rec., pp. 46, 161), into signing it on the spot, we might understand the matter better. But Levison says he did not know that Fellerman was illiterate (Rec., p. 130), and he not only gave him time to read the contract, but advised him to take his son's counsel upon it.

But that is not all. Levison too, wanted time "to call to look into your business at once or find out who you are; you are an entire stranger to me" (Rec., p. 106). But Levison did not call. *All he did was to go into his outer office and look up Fellerman's rating with the mercantile agencies* (Rec., p. 107) *And that was all the investigation he ever made* (Rec., pp. 141-2). No delay was necessary for that kind of investigation.

B. The meeting of August 14th.

On Monday, August 14th, 1905 (Rec., p. 107), Fellerman called on Levison. He was accompanied by Max W. Solomon, who holds a few shares of stock in the defendant Company. Solomon introduced Fellerman to Levison, and stated "that he had known him for a number of years as a very responsible man, and anything that I (Levison) possibly could do for him would be very much appreciated" (Rec., p. 107). Solomon then departed, leaving Fellerman with Levison (Rec., pp. 107–8). Solomon says, however, that before he left, Levison looked up Fellerman's rating with Dun and Bradstreet (Rec., p. 87). So apparently Levison had not done this during the time intervening between his

alleged interview of the 11th and the present interview of the 14th.

Then Fellerman says that he asked for a loan, saying that "he was very short." Levison "just said 'yes,' if I would show him the accounts and the accounts were good he said he would lend me the money" (Rec., p. 29). "I simply told him I was very short of money; my creditors were pushing me, and I needed the money to pay them; that I had a note to pay off and I must pay it off the next day or the same day" (Rec., p. 31). After securing Levison's consent to this proposition Fellerman went to his office accompanied by Julius Lewis, an employee of the appellee (Rec., p. 30).

Arriving at Fellerman's office Lewis, as Fellerman says, "looked up every page on the books" (Rec., p. 30). Both his bookkeeper, however (Rec., p. 35), and Lewis (Rec., p. 95) testify that Lewis asked only for the ledger containing the accounts receivable. Lewis did not stay long at Fellerman's office. He simply fulfilled his purpose of his going, which was to show the bookkeeper how to stamp the accounts as transferred to the defendant (Rec., p. 98). Accordingly he showed her how to stamp a few accounts and left, taking with him a lot of Fellerman's bill-heads for use in notifying customers of the transfers of the accounts (Rec., p. 35). The bookkeeper says that Lewis looked up all the accounts receivable and stamped them (Rec., p. 35). But Lewis positively denies this (Rec., p. 95) and says that he simply showed her how to stamp the accounts and then left without seeing her do it (Rec., p. 95). It is clear from the bookkeeper's testimony, however, that nothing was re-

fused Lewis which he asked for and that he asked for nothing (Rec., pp. 35-6).

If Lewis had looked at the books he would have discovered that the bankrupt was insolvent. The books, of course, showed it; their later destruction by the bankrupts is sufficient evidence of that. But he carefully omitted to do so. He cannot, however, nor can the appellee, escape the knowledge which these books would have afforded by a refusal to examine them.

In re Pease (129 Fed., 446).
Clements vs. *Moore* (6 Wall., 299).
Singer vs. *Jacobs* (11 Fed., 559).
Dokken vs. *Page* (147 Fed., 438).

The language of the Circuit Court of Appeals in a leading case is exactly in point:

> "The means for ascertaining the exact amount of the indebtedness were at hand but were not called for. Mr. Chittenden does not claim that he asked Pease for either his books or his invoices of his stock."

In re Pease (129 Fed., 446, 452).

Then Fellerman returned to the appellee's office and told Levison, as he says, that he was pressed by his creditors and had a note to pay (Rec., p. 31). This note was for $3,000, as it finally appears (Rec., p. 50). Levine, Fellerman's son-in-law (Rec., p. 31), was an endorser on this note (Rec., p. 50), and it was held by the bank for collection (Rec., p. 31). Levison thereupon gave Fellerman a check for $3,000 as an advance upon the amount. The contract was drawn up and

signed (Rec., p. 30). The contract provides, as will be noted, that the banker shall advance the customer three-fourths of the net face value of the accounts; $3,000 was not three-fourths of the net face value, but Levison advanced Fellerman this much anyhow.

Then comes this significant fact. Fellerman testifies that Levison told him that for the balance which was due him as the advance under the agreement he, Fellerman, could buy shares in the appellee company and "afterwards I could transfer the shares to anybody I wanted to—either to my wife or my children or anybody" (Rec., pp. 30-1, 52, 39, 60). Fellerman at first said that Levison made this suggestion both on the 14th (Rec., pp. 30-1, 52), and on the 18th (Rec., p. 39), and afterwards said it was only on the 14th (Rec., p. 53). Woerblin, Fellerman's son-in-law (Rec., p. 61), who accompanied him on the second occasion of August 18th (Rec., p. 61), testifies that on that day Levison suggested that Fellerman invest in stock of the appellee company (Rec., pp. 62, 63, 64, 65). This testimony of Woerblin, though fiercely assailed, remained unimpeached. Levison at first said that he did not remember whether Woerblin was present (Rec., p. 220). Then he conceded that Woerblin was sitting in the outer office when the conversation occurred (Rec., p. 140). But finally he admits that Woerblin was present inside the room when he conversed with Fellerman (Rec., p. 154).

Levison's version of this conversation of the 14th is that on that day Fellerman came accompanied by Solomon (Rec., p. 107). Fellerman then bargained with

Levison over the rate to be charged, taking up again the conversation of the 11th. Levison finally agreed, as a great concession, to allow Fellerman a 2% rebate on every group of accounts aggregating $100,000 (Rec., p. 108). This is a very remarkable piece of evidence, because Levison shortly after the bankruptcy had been fully examined on these matters (Rec., pp. 210, 220). and, although telling a very circumstantial story, did not mention this offered concession. He can only now account for this omission by saying that it was not present in his mind at the time when everything else was most present in his mind (Rec., pp. 128-9). However that might be, his testimony agrees with that of Fellerman that he sent the latter, together with Lewis, to Fellerman's place of business. Fellerman returned with accounts of the face value of $5,232.39. He then said he had a $3.000 note to meet that day and asked for an advance. Thereupon Levison allowed him $3,000 on account (Rec., pp. 108-9). The contract was signed at the same time, the blanks therein having been filled in by the defendant's employee, Debolt (Rec., p. 109). Immediately notices were sent out to all the customers that the accounts had been assigned (Rec., p. 109). Then Levison ordered Debolt to make out a check for $3,000 to Fellerman's order. But at Fellerman's request cash was given him instead of the check, the latter being cashed by Mr. Debolt at the bank (Rec., p. 111).

In other words, Fellerman was paid in such a manner as to leave no trail. Levison attempts to give a reason for this. He says that Fellerman requested cash instead of a check, because if a check was given it would not

reach his bank in time to keep the note from being protested (Rec., pp. 111, 168, 49, 226). It is remarkable, however, that both Levison, who has done business with his own bank many times (Rec., p. 122), and Fellerman, who, prior to his transaction with the appellee, had borrowed money "in my own name in the banks thousands and thousands of times on my own signature" (Rec., p. 61), could have such a childish reason for transacting the business in cash instead of a check. Their explanation is that they were afraid the check would not go through in time to meet the note. But why would cash be any better? They had to go to the bank to get the check cashed, because Debolt testifies that there was not enough cash in the house (Rec., p. 168). It would not have taken any longer to get the check certified and deposit it to meet the note than to get the check cashed and deposit the cash to meet the note.

The real reason of course was, to use the argot of this class of business, that "cash leaves no trail."

The least that can be said of this transaction is that it was very much out of the usual course of business. But that of itself is a strong badge of fraud.

Kempner vs. *Churchill* (8 Wall., 362).
Hyde vs. *Sontag* (1 Sawyer, 249, Fed. Case No. 6974).

Another thing was unearthed at the trial about which Levison did not testify when he was first examined. It now appears that Levison made one Schiller, Fellerman's son-in-law (Rec., p. 33), guarantee the accounts which Fellerman had transferred. Fellerman

denies any knowledge of this (Rec., p. 161), but Levison finally proves the fact, although it had never occurred to him to mention it on his previous examination (Rec., pp. 151, 156, 161). If this had been an honest transaction of a loan upon the security of accounts receivable, why should the appellee have exacted a guaranty? Why should the appellee have advanced money on the accounts before it had looked them up? These questions are left unanswered by the appellee.

C. The Transaction of August 18, 1905.

On Friday, August 18, 1905, Fellerman came again to see Levison (Rec., pp. 33, 39). This time he was accompanied by Abner Woerblin, his son-in-law (Rec., p. 61). Levison finally admits that Woerblin was present at this interview (Rec., p. 154). Fellerman brought some more accounts with him (Rec., pp. 33, 39). On the credit of these Levison gave him $1,000 (Rec., pp. 39–40). Thus the total the bankrupt received was $4,000. In this respect Levison's statement, which says that he got $4,475 is false (Rec., p. 40). Levison made Fellerman sign receipts for $3,000 on August 15th, and on the 18th for $1,125 and $267.73 (Rec., pp. 114, 226). The account later made up by the appellee is to the same effect (Rec., p. 225). But Levison finally corroborates Fellerman in the statement that the latter got exactly $4,006.33 (Rec., p. 216). Why this did not plainly appear is the subject of a very interesting colloquy between Levison and the cross-examining counsel. The in-

telligent interest taken in this point, as well as all others, by the jury is shown by the question of the fourth juror (Rec., pp. 135, 114). Woerblin, who was present at this conversation of August 18th, states that this $1,000 was paid Fellerman in the same manner as before, namely, in cash (Rec., p. 62).

Levison's version is that on this occasion Fellerman again asked for money. He brought with him $2,495.50 of accounts and Levison finally agreed to allow him $1,000 upon them. Then the total amount of accounts assigned was made up (Rec., p. 113). That was in the morning, as both Fellerman (Rec., p. 33) and Levison (Rec., p. 112) agree. Levison says that Fellerman came again in the afternoon and asked for more money, which was refused (Rec., pp. 116, 117).

Under a previous point we have already detailed Fellerman's adventures of the 18th and the early morning of the 19th succeeding his interview with Levison. We have seen how he immediately proceeded to transfer the equity in these accounts to Gordon, and to sell the remaining accounts to Stich. This transfer to Levison was merely a part of a wholesale scheme of fraud by which the creditors of Fellerman would be deprived of all his accounts receivable which constituted his principal asset. It now remains to notice an intervening transaction which Fellerman had with the lawyer who represented him in the bankruptcy proceedings :

D. The Transaction with Leonard Bronner.

Fellerman testifies that on August the 14th or 15th, just after he returned to his shop from his interview

with Levison, he got a telephone message to see Leonard Bronner, a lawyer. He had never heard of this lawyer before, but on the advice of his son he called upon him. Bronner's salutation was,—"I understand you are going to fail" (Rec., p. 42). Nothing came of this surprising conference, but the next day Bronner called up again and repeated his prophecy of failure, requesting Fellerman to retain him as his lawyer. Fellerman accordingly retained him (Rec., p. 43) though he had never had a lawyer before (Rec., p. 57).

Bronner, who represented Fellerman in the bankruptcy proceedings (Rec., p. 81) admits that he had never heard of him before (Rec., p. 81) and that Fellermam paid him a fee of at least $700 in cash (Rec., p. 85). He asserts that he was retained on Friday, the 18th (Rec., pp. 81, 85). The petition was filed on Saturday, the 19th (Rec., p. 81). Bronner's explanation for Fellerman's retaining him was that Woerblin, Fellerman's son-in-law, whom he had never seen before, asked him to act for Fellerman (Rec., p. 81). He denies that he knew the appellee company at that time (Rec., pp. 81, 82). But he concedes that his office force may have met the appellee much earlier than he did (Rec., p. 82). And he finally admits that a clerk of his may have telephoned Fellerman (Rec., p. 84), asking him to come to see Bronner, instead of Woerblin, who he at first thought had done this (Rec., p. 81).

Woerblin testifies that he knew nothing of Fellerman's troubles until the 18th, just before they went to see Levison (Rec., pp. 66-7). He contradicts Bronner's story, stating that he knew nothing of Fellerman's re-

taining Bronner until after it was over. And when it was over Fellerman told him the same story of his dealings with Bronner that he told on the witness stand (Rec., p. 67).

It is apparent that the learned Judge and the jury, who saw and heard these witnesses, believed Fellerman and Woerblin instead of Bronner. That left the defendant to explain how it was that Bronner, who knew neither Fellerman nor Woerblin, knew that Fellerman was going to fail before the latter, as he says (Rec., pp. 42, 57), knew it himself. Of course we cannot believe Fellerman when he says that he did not know he was going to fail. The material fact is that Bronner knew it without the bankrupts telling him. Both Fellerman and Woerblin, the latter being a very careful witness, testified that neither of them sought out Bronner and that Bronner sought them. How did Bronner know anything about the matter? The appellee offers no explanation except denials.

E. The Additional Badges of Fraud.

We think enough has been shown already to have put Levison on inquiry as to Fellerman's intent to defraud his creditors. Even if Levison did not actually know that Fellerman intended to defraud his creditors, yet enough facts were present to have put him on inquiry as to Fellerman's purpose; and this inquiry would have resulted in the knowledge that the appellee could not lawfully have gone into the transaction. All that is required in cases of this sort is such notice as

would put a reasonable and honest man on inquiry. To use the expressive language of HOUGH, J.:

> "It would be intolerable that the inviolability of a preference should depend not upon the effect of facts admittedly or by proof known to a defendant, but upon the degree of intelligence or experience which such defendant was capable of exercising in respect thereto; such a rule would put a premium upon ignorance and encourage the assumption thereof."
>
> *Wright* vs. *Sampter* (152 Fed., 196).

To quote the language of this Court:

> "In choosing to remain ignorant of what the necessities of the case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy,"
>
> *Walbrun* vs. *Babbitt* (16 Wall., 577, 582).

In fact, however, this case is replete with other circumstances indicating the appellee's lack of good faith besides those already discussed.

1. *The extraordinary nature of the appellee's business.*

What legitimate function does a company like the appellee fulfill in a mercantile community like New York? It was organized under the laws of the State of Maine to conduct a banking business and discount accounts (Rec., p. 105). It does not appear, however, that it has qualified under the banking laws of New York. The only banking function that it could lawfully exercise in New York was that of

lending money on accounts. The funds for this purpose it could procure only by advances from regular banks, because it did not have the banking powers sufficient to enable it to have a large enough cash capital. Levison accordingly testifies that he transacts a very large business with the banks (Rec., p. 122).

It is difficult to see how this appellee could conduct a legitimate competition with the banks in lending money on the accounts of merchants. It is well known that merchants can borrow money directly from the banks on their accounts receivable without paying the extortionate commissions which the defendant charged in this case. Fellerman testified that he has borrowed money "in my own name in the bank, thousands and thousands of times on my own signature" (Rec., p. 61). Solomon, the stockholder in the defendant company who introduced Fellerman to Levison, testifies as follows: "Q. You had never done any business with that company? A. No. Q. You got all money from your bank at 6% or less? A. Or less" (Rec., p. 93). Levison himself, when pressed on this point (Rec., p. 122), could not really explain what legitimate function the appellee can fulfill.

As a matter of fact Levison, although engaging in a business which, if legitimate, is in competition with that of the New York banks, has had practically no banking experience. His transactions with the bankrupt occurred in August, 1905. His company had only been organized in the previous year (Rec., p. 105). Although he was in practical control of the appellee company, yet for all his life prior to its formation he had never

done any banking business, but instead was engaged in the manufacture of shawls (Rec., pp. 121-122). If this company were as innocent as Levison claims, its competition with the established banks of New York, conducted by a shawl manufacturer, would be pitiful.

2. *The methods of the appellee company.*

It does business principally in cash. Levison, (Rec., p. 150) and Debolt, (Rec., pp. 175-6), both testify to this fact. Debolt very frankly says that "Most of the people ask for cash" (Rec., p. 176). The fate which befell all of these customers of the appellee who prefer cash to checks is also graphically set forth in the testimony of Levison. So many of them immediately after asking for and receiving cash, went into bankruptcy within the first year of the Company's existence that Levison was compelled to adopt a regular course of business for such cases (Rec., pp. 118, 137, 150). We will let Mr. Levison tell it in his own words:

> "We have in every instance found that when a party fails or goes into bankruptcy the receivers or the attorneys for the receivers, or some fellow to whom the accounts have been assigned will go to work and write these different people, always stating to them to remit them; and we at times would find that it would take us years to get our money either from the receiver or the attorney for the receiver, or whoever had anything to do with it. So we have established the practice that the moment a man fails and it is embodied in our contract that we will at once go to work and send these accounts to an attorney," etc. (Rec., p. 137).

3. *The extortionate bargain.*

The total amount of accounts assigned by Fellerman to the defendant and the amount which he actually received thereon, are as follows :

On August 15th the accounts assigned were $5,232.93, and the amount advanced was $3,000.

On August 18th the accounts assigned were $2,495.50, and the amount advanced the bankrupt was $1,000.

Referring to Exhibit 7 (Rec., pp. 200-203), it will be noticed that upon the accounts assigned on August 15th there was already due $1,685. There would be due before September 1st $930, and between September 1st and 16th $1,800. Of the accounts assigned on August 18th over $1,600 would become due before September 1st and over $500 would become due during September. Taking both these transactions together, more than forty per cent. of the amount advanced on these accounts was already due when the advance was made, and more than the entire advance of $4,000 was due or would be due within two weeks. It is inconceivable that a merchant intending to continue in business would have borrowed money on these accounts. Levison admits that the full amount of all of them was collected within forty days (Rec., p. 214). The contract provided that the bankrupt should receive 75% of the face value of these accounts (Rec., p. 204). But the bankrupt gladly took but little more than 50% of accounts practically due, and all good.

The situation is even more extraordinary when we consider what the bankrupt agreed to pay for this privilege. He consented to pay 6% on the money advanced, 5% on

the gross amount of accounts transferred, and collection fees, postage, interest and sundries, which brought the charge up to $845 (Defendant's Exhibit F, Rec., p. 225). Part of this $845 is composed of a pretended attorney's fee for $311.99.

This attorney's fee throws a strong light on the entire subject. The attorney to whom these accounts were transferred for collection was one Ralph Nathan. Although these accounts were all good and a large part of them were already due, and although notices had already been sent to the customers of the assignment, yet Levison testifies that as soon as he learned of the failure he turned over the entire lot of accounts to Nathan for collection (Rec., p. 117). And Nathan, although he cannot show any letters written to these customers, charged ten per cent. for collecting these accounts without any effort (Rec., pp. 183–4). Levison testifies that this was in accordance with his custom, to which reference has already been made (Rec., p. 137). Yet none of the corespondence between Levison and Nathan, or Nathan and the customers, was produced or accounted for (Rec., pp. 148, 133, 210, 117, 118, 227, 154, 158–9). A further remarkable feature of the matter is that Nathan's account with the company which was put in evidence, and his receipts and statements (Rec., pp. 227, 228, 231) show that money had been paid Nathan by the appellee, on account of these very transactions, prior to the bankruptcy (Rec., pp. 134, 149, 118, 154, 158–9, 133). Nathan's relations with the appellee were very close, according to his own testimony.

"I would once in a while with the National Dis-

> count Co. want some cash after banking hours, and I would say let me have $25 or $50 or $40, or whatever the amount was, and one of these slips would be presented to me and charged against my account and I would receive the money, and when I sent in my final bill these slips were presented and deducted" (Rec., p. 181).

It can only be concluded that the "attorney's fee" was a mere blind for an additional charge.

4. *The refusal to inquire into Fellerman's condition.*

The Court may profitably notice the appellee's extraordinary abstension from inquiry about Fellerman's affairs. Fellerman's testimony we have already narrated. Corroborated by Woerblin, this testimony is that he asked for the loan and he got it without more ado. Lewis, whom Levison sent to Fellerman's place of business, looked only at the ledger containing the accounts receivable, and did not look at all of these accounts. He simply gave the bookkeeper directions how to stamp them and, taking a number of the bankrupt's bill heads, he left the place.

The most interesting feature of this topic is the testimony of Levison. He testifies, as we have seen, that after Fellerman's first visit :

> " I went into the office and looked up his rating in Dun and Bradstreet, and found his rating. To be perfectly sure with them, I have it written on the contract. I think it was $50,000 to $75,000 good, in Dun, and in Bradstreet $50,000 to $75,000 fair" (Rec., p. 107)

On cross-examination he at first testified as follows:

"Q. Of course, if you had for a moment imagined that Mr. Fellerman was going into bankruptcy the day after he was at your office you most assuredly would have refused to do any business with him. A. Most assuredly.

Q. You don't want to be mixed up with anything like that? A. No, sir.

Q. And if you had dreamed for a moment that he was anywhere near insolvent, you would have sent him out; or, if any circumstance was called to your attention that would have made you suspicious about his financial standing you would have refused to do business with him? A. We should.

Q. And would your refusal and your attitude, as you have explained it to me, be because you would think it was improper? A. Improper?

Q. Yes. A. To lend him money?

Q. Yes, under those circumstances? A. Well, I wouldn't have done any business with him at all.

Q. And the reason you would have refused to do business with him would be because you recognized now, and did then, that such transactions would be improper? A. Yes.

Q. And if the slightest circumstance was called to your attention which would have led you to believe it was improper, you would have immediately shown him the door? A. Most certainly" (Rec., pp. 122, 123).

"Q. When Mr. Fellerman first came to you, when he made this proposition to finance the business, you told him that you would have to investigate. A. Yes, I would think the matter over.

Q. Well, investigate it, didn't you? A. Well, you may put it that way.

Q. No, I want you to put it that way. A. I don't think I made a remark to him about investigation.

Q. Didn't you say here in your own language. 'It

took several days to look up the proposition'? A. Yes, sir.

Q. That is right? A. That is right.

Q. When you say, 'Look up the proposition,' you mean to look into whether or not it was advisable for you to enter into the contract which was proposed to you to be made? A. Yes, sir.

Q. You wanted to find out who A. Fellerman & Son were? A. Yes, sir.

Q. What kind and character of business they conducted? A. Yes, sir.

Q. Whether they had money or had not? A. Yes, sir.

Q. What were their assets and what were their liabilities? A. Yes, sir.

Q. Whether they were solvent or insolvent? A. Yes, sir.

Q. Whether the stock they had on hand was a good stock or a new stock or an old stock? A. Yes, sir.

Q. Whether the concern, in fact, was a going concern or a dead concern? A. Yes, sir.

Q. Whether they were about to fail or about to continue in business? A. Yes, sir."

And then, *mirabile dictu*, comes this testimony:

"Q. Did you do anything to find out these things except to look in Bradstreet's or Dun's, or both, for the rating which those two concerns gave them? A. Nothing else was necessary." (Rec., p. 141).

On a previous occasion Levison testified as follows:

"Q. What questions did you ask them? A. I might have asked them whether they were solvent.

Q. Did you ask him whether he was transferring all his accounts to you? A. I do not remember that.

* * * * * *

Q. Did he tell you that he was pressed for payment of his debts by his customers? A. I don't know, sir.

Q. Did you make any inquiries to find out? A. Not that I remember.

* * * * * *

Q. Did you ask him why it was necessary for him to cash his accounts? A. None of my business." (Rec., p. 218).

Again he said:

"It is customary for me to ask questions, but I don't remember now what questions I asked him" (Rec., p. 218).

And again:

"Q. Did you ask to inspect his books? A. I don't remember that.

Q. You have never inspected books, have you, before you went into these transactions? A. Sometimes I have.

Q. You have a great many of these transactions—that is the regular business of the National Discount Co.—and before you advance on accounts do you ever have their books examined, or examine them yourself? A. No, sir.

Q. You rely on the collateral? A. Exactly" (Rec., p. 220).

But when it came to his testimony in this case, Levinson says that he does not remember whether he asked them if they were solvent (Rec., pp. 144-145), and he practically does not remember anything else that he said to them (Rec., pp. 145-6-7). The final conclusion of his testimony on this head is: "*I don't think that I did make any inquiries after I had looked at the man's rating*" (Rec., p. 147).

If that is so, then Levinson has brought the defendant's case exactly within the authorities which condemn transactions of this character.

To use the language of BUNN, J., in a case heard before him and Mr. Justice HARLAN:

> "Whether he knew all or not, he knew enough to put him upon inquiry. The circumstances showed that he must have known of the fraudulent intent of his grantor. And if so, or if he had knowledge of the facts sufficient to excite the suspicion of a prudent man and put him on inquiry, he made himself a party to the fraud."
>
> *Bartles* vs. *Gibson* (17 Fed., 293, 297).

That is what the learned Judge and the jury which assisted him found after hearing and observing all the witnesses. It should be strong reasons which could induce an Appellate Court to reverse their conclusion.

To use the language of the New York Court of Appeals:

> "The fraudulent intent of the grantor in the conveyances to the defendant being admitted, the circumstances were such that knowledge of this purpose on the part of the grantee could have been inferred as a reasonable conclusion. * * * All we mean to say, however, is that when the trial Court, after hearing all the parties and having the benefit of their presence and appearance, and after weighing all the circumstances, refuses to adopt such theory, and in fact reaches a contrary conclusion, this Court cannot say that such finding is without any evidence to sustain it. The various steps by means of which the whole transaction was consummated were of such an unusual character that the learned trial Judge was

warranted in finding that none of the parties benefited by it could have been entirely ignorant of its real scope and purpose."

Metcalf vs. *Moses* (161 N. Y., 587).

The Circuit Court of Appeals did not reverse on any such questions of fact. Its decision turned on certain questions of law which will now be discussed.

POINT IV.

A conveyance may be fraudulent as against creditors even though it is made for an actual consideration or loan.

In this case a substantial consideration was given by the appellee to the bankrupt. But the appellant asserts that the transaction is just as fraudulent as against the creditors of the bankrupt as though the bankrupt had transferred these accounts to his wife or his child for no consideration. The claim of the trustee rests on Sections 67e and 70e of the Bankruptcy Act. But it also stands on the decisions of the common law and equity courts under the Statute 13 Elizabeth, C. 5, commonly known as the Statute of Fraudulent Conveyances.

Our Bankrupt Act provides in the section cited (§ 67e) as follows :

> "That all * * *, transfers, * * * made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchases in good faith and for a present fair consideration * * *."

§ 70 (e) provides that—

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value."

This is by no means a new provision in our bankruptcy legislation. Similar provisions have appeared in every previous bankrupt act. A similar provision has appeared in every bankruptcy act known to the legislation of England since the days of James I. The Courts have held that these statutes add nothing to the doctrines obtaining under the ordinary Statute of Fraudulent Conveyances of the 13th Elizabeth. The object and effect of these bankruptcy statutes is simply to confer upon the bankruptcy trustee the rights which the creditors of the bankrupt already had under the Statute of Fraudulent Conveyances.

Coder vs. *Arts* (213 U. S., 223).
Williams on Bankruptcy (8th London Ed.), p. 19.

This last mentioned statute (13 Eliz., c. 5) was by no means the first attempt of the English Parliament to legislate against the evils so graphically portrayed in its recitals. As far back as the time of Edward III, Parliament attempted to prohibit practices which were startlingly modern. No less than three Statutes of Fraudulent Conveyances were passed prior to the time of Queen Elizabeth (2 Rich. 2nd, c. 3; 50 Edw. 3rd, c. 6; 3 Henry 7th, c. 4).

The recitals in the Statute of 50 Edw. III, c. 6, would almost precisely apply to the present-day conditions in mercantile circles. It states that :

> " Divers persons do give their tenements and chattels to their friends by collusion to have the proceeds at their will, and afterward do flee to the precincts of Westminster, or of St. Martin's LeGrand of London, or other such privileged places, and there do live a great time with a high countenance of another man's goods, and profits of the said lands and chattels, till the said creditors shall be bound to take a small parcel of their debt, or take the remnant."

Thus it will be seen that even prior to the publication of English Reports, and in the dawn of English institutions, the practice was common for a debtor to convert into money his property and then with the money enjoy life to the exclusion of his creditors. Of course in those days it was necessary for the debtor to flee to sanctuary in order to escape imprisonment for debt. Nowadays a fraudulent debtor does not need the protection of Westminster or St. Martin's LeGrand, because imprisonment for debt has been abolished. He can, to quote the words of the old statute, " live a great time with a high countenance on another man's goods," wherever he pleases instead of being bound by the limits of Westminster or the Parish of St. Martin's LeGrand, so far as his personal liberty is concerned.

There seem to be no reported decisions under these ancient enactments.

But the Statute of Elizabeth, which forbids any transfer of one's property with intent to hinder, delay or defraud his creditors was comprehensive enough to include

just such a case as the draftsman of the statute of Edward had in mind. And this latter Statute has been amply enforced.

And so it has been determined by all the Courts that a conveyance, though for a full consideration, may yet be void under the Statute, if the recognized elements appear of fraud on the grantor's part, and had faith on the part of the transferee.

Cadogan vs. *Kennett* (2 Cowp., 432);
Graham vs. *Furber* (14 C. B., 410);
Coder vs. *Arts* (213 U. S., 223),

and other cases cited under the next points.

POINT V.

In determining whether the conveyance is fraudulent the chief factor is the intended disposition of the consideration.

The question is whether the debtor intends to apply the consideration, which takes the place of his former property, to the honest purpose of paying his creditors on a plane of equality, or, on the contrary, intends to place the consideration in such a shape that the creditors will be defrauded of it.

This Court in discussing the subject recently has said:

> "It makes no difference that the conveyance was made upon a valuable consideration, if made for the purpose of hindering, delaying or defrauding creditors. The question of fraud depends upon the motive."
>
> *Coder* vs. *Arts* (213 U. S., 223).

If the intended disposition of the consideration is itself forbidden by law, then it is just as bad a case of fraud as though there had been no consideration.

POINT VI.

As part of the money the bankrupts received from the appellee they applied to their own uses to the exclusion of, their creditors, the decree of the Circuit Court of Appeals is clearly erroneous to that extent.

We have already shown, under our Second Point (*supra*, pp. 11–16), that the $1,000 which the bankrupts got from the appellee on August 18th has never been accounted for. The Circuit Court of Appeals therefore clearly erred in dismissing the bill *in toto*. Indisputably it should have been retained at least to the extent of $1,000, interest, and costs. The learned trial Judge, in instructing the jury, seems to have made a like error (Rec., p. 190). But to him the distinction was unimportant. His view, which we submit is correct, was that it made no difference whether the bankrupts put the money in their pockets or used it to prefer certain of their creditors. But if this Court should hold that the distinction is material, then we would call its attention to the above mentioned fact that $1,000 of the money in suit was not used to prefer creditors, but was applied to the bankrupts' own use. To this extent the ruling appealed from is based on a false premise, is erroneous, and should be reversed.

POINT VII.

Though the bankrupts used $3,000 of the funds received from the appellee to prefer a favored creditor, the transaction is none the less fraudulent.

As we have seen under our Second Point (*supra*, pp. 11-16) the $3,000 cash which the bankrupts received on August 15th, 1905, they used to pay a note on which their close relative was an endorser..

The question on which the Courts below differed was whether this fact saved the transaction from being fraudulent.

In discussing this the learned District Judge said to the jury :

> " As far as appears in this case they were actual indebtedness; but it is very often the case in bankruptcy that when a man finds out he is going to fail he turns his assets into cash and with that cash pays certain creditors whom he wants to have paid, and leaves the others without payment; and that case is just as much within the provisions of the bankruptcy act as if he had turned his money into cash and hidden or concealed it for his own purposes. The substantial object of the Bankrupt Act is to require a man who is insolvent to have his property distributed ratably among his creditors. And it appears in this case that Mr. Fellerman was engaged just on the eve of the bankruptcy in turning his accounts into cash and paying with it certain favored creditors, leaving the great mass of his mercantile creditors from whom he got the goods which he had sold, for which he got these accounts without any provision for the payment of their debts " (Rec., p. 190).

The Circuit Court of Appeals took exactly the opposite view of the law. Speaking through NOYES, J., the learned Court said:

> "So far as Fellerman was concerned the payments made with the money obtained from the defendant were undoubtedly preferences. The money might have been recovered if the creditors had had reasonable cause to believe that preferences were intended. But there is no evidence that the payments were fraudulent. There is a marked distinction between a preferential payment and a fraudulent conveyance. Every preferential payment must to some extent hinder and delay creditors, but it is not necessarily a fraudulent conveyance" (Rec., p. 256).

The learned Judge refers to this Court's decision in *Coder* vs. *Arts* (213 U. S., 223), and then proceeds:

> "A preferential payment may be constructively fraudulent, but it is not in and of itself a fraudulent conveyance It can only become the latter in the unusual case where actual fraud in addition to the preference is established. Thus a secret trust in favor of a person making such payments might turn a mere preference into a fraudulent conveyance. But there is no proof in this case of intent to hinder or defraud creditors more than the preferential payments in themselves would have hindered them" (Rec., pp. 256, 257).

The learned Judge then refers to *Sergeant* vs. *Blake* (160 Fed., 57, 61) and *Ex parte Stubbins* (17 Ch. Div., 58).

In addition to the cases referred to by the learned Judge may be mentioned the authorities cited by the defendant in the Circuit Court of Appeals.

In re Maher (144 Fed., 503);

In re Bloch (142 Fed., 674);
Githens vs. *Schiffler* (112 Fed., 505).

The only two cases of those above-mentioned requiring any discussion on their facts are *Ex parte Stubbins* (17 Ch. Div., 58) and *Githens* vs. *Schiffler* (112 Fed., 505).

In *Ex parte Stubbins* (17 Ch. Div., 58) a trustee had embezzled a trust fund. Becoming conscience stricken and fearing prosecution, he sold certain of his property to the claimant, the latter knowing the intended disposition of the proceeds. The embezzler paid these proceeds in to the credit of the trust account. Within three months he was adjudged a bankrupt. His bankruptcy trustee undertook to recover from the claimant the property which had been conveyed to him. The Court of Appeal held in favor of the claimant. JAMES, L. J., who delivered the judgment of the Court, undoubtedly expressed himself as favoring the view that a conveyance is not fraudulent where the intended disposition of the consideration is to prefer certain creditors.

But that was not the actual decision of the case. It was a dictum by JAMES, L. J. The learned Lord Justice, after using the language quoted by the Circuit Court of Appeals, goes right on to hold that, under the English Bankrupt Act, *restitution of stolen property by a bankrupt cannot constitute a preference.* That case has been followed in England and is referred to in all the subsequent decisions as *standing only on the proposition of law*

that restitution of embezzled funds cannot constitute a preference.

New's Trustee vs. *Hunting* (1897, 1 Q. B., 607; 2 Q. B., 19);
In re Lake (1901, 1 K. B., 710);
In re Blackpool Motor Car Co. Ltd. (1901, 1 Ch., 77);
Ex parte Taylor (18 Q. B. D., 295);
Ex parte Luck (49 L. T., 810).

The same doctrine has been expounded by the very Circuit Court of Appeals from which this present appeal is taken (*McNaboe* vs. *Columbian Co.*, 153 Fed., 967), although it has recently been repudiated in the First Circuit (*Clarke* vs. *Rogers*, 183 Fed., 518).

It is also noteworthy that the latest English book on the subject of fraudulent conveyances mentions *Ex parte Stubbins* as standing only for the proposition above mentioned, viz.: that restitution of stolen funds cannot be a preference. But nothing is said of this case being authority for anything else.

Hunt on Fraudulent Conveyances (2nd London Ed., 1897), p. 165.

Of course a dictum by Lord Justice JAMES is entitled to great respect, but the fact remains that the dictum of the learned Lord Justice does not appear to have been given as much weight in England as it has in some Courts of this country.

In *Githens* vs. *Schiffler* (112 Fed., 505), ARCHBALD, J., refers to *Ex parte Stubbins*. But it did not appear in

that case from the opinion of ARCHBALD, J., or the statement of facts that the vendee knew or had reason to know what the bankrupts intended to do with the money. Here, as we have shown, the appellee, at least, was put on inquiry.

The upshot of the matter, therefore, is that the decision of the Circuit Court of Appeals in the present case finds support only in the language of Judge ARCHBALD and in the dictum of Lord Justice JAMES.

We respectfully venture to set off against this dictum of Lord Justice JAMES and this decision, if it may be so styled, of Judge ARCHBALD, the contrary decision of another Circuit Court of Appeals, of several District Courts, of so eminent an authority on the law of bankruptcy as Judge LOWELL, and of the Supreme Court of Massachusetts. For a great many years the Bankrupt Acts of both England and this country have prohibited preferential transfers. The present Act prohibits such transfers. We respectfully contend that under the weight of authority a transfer is fraudulent as against creditors if its purpose is to use the proceeds in preferring certain of the bankrupt's creditors.

Roberts vs. *Johnson* (151 Fed., 567);
In re Pease (129 Fed., 446);
In re Beerman (112 Fed., 663);
Ex parte Mendell (1 Low., 506; 4 N. B. R., 302; Fed. Case No. 9418);
Crafts vs. *Belden* (99 Mass., 535).

This point has recently been determined by the Circuit Court of Appeals of the 4th Circuit in *Roberts* vs.

Johnson (151 Fed., 567). The head note of the case states the decision :

> " An insolvent, eight days before filing a petition in voluntary bankruptcy, executed a mortgage for borrowed money to a brother of a large creditor, covering substantially all of his property. The loan was arranged for by another brother of the creditor, who was also his agent for collection of the debt. The amount borrowed was slightly more than the claim, and was turned over in payment of the same before the debtor left the office where he received it. *Held*, that such facts justified a finding that the mortgagee knew, or had reasonable cause to believe, that the purpose of the transaction was to prefer his brother in violation of the bankruptcy act, notwithstanding his denial, and a decree, setting aside the mortgage under Bankr. Act, July 1, 1898, C. 541, Sec. 67e, 30 Stat. 564 (U. S. Comp. St., 1901, p. 3449), as one given with intent to hinder, delay and defraud other creditors."

The Court, speaking through BRAWLEY, J., said :

> " Courts cannot permit to be done by indirection what the law forbids to be directly done, and, without regard to the form, they consider the purpose and effect of the transaction, however devious the ways by which it is accomplished. The obvious effect of these dealings has been the defeat of the purpose of the bankrupt act. William H. Roberts has received payment of his debt in full, and the other creditors are deprived of their proportionate share of Bramble's property, which that act was designed to secure. This result has been attained by the attempted transfer of property, which in Bramble's insolvent condition he held as in trust for all of his creditors, to a brother of the preferred creditor."

Roberts vs. *Johnson* (151 Fed., 567, 570).

The bill in that case was against both the creditor who had been preferred and the transferee of the property. The bill treated the transaction solely as a fraudulent conveyance. The decree, as appears from an examination of the original record, set aside the mortgage and directed that the property be restored to the plaintiff.

A case equally in point is *Crafts* vs. *Belden* (99 Mass., 535), where similar provisions of the Massachusetts insolvency law were involved. In that case, indeed, the creditor who received the preference was wholly innocent. The defendant, as in the present case, bought the bankrupt's property, knowing that the bankrupt intended, with the money received from the sale, to prefer the innocent creditor. The Court held that the transaction was fraudulent, saying, through FOSTER, J. :

> " If he had reasonable cause to believe that it was the vendor's intent to contravene the insolvent laws, the sale would be void, although the benefit of the preference might enure, not to himself, but to another and wholly *bona fide* and innocent creditor who by reason of his innocence could retain his payment. The provisions of the statute are as broad and sweeping as possible, and are levelled against the most indirect and circuitous preferences (Gen. Sts., c. 118, §§ 89, 91). If any part of the purpose of the sale or conveyance was fraudulent, the whole was void."
>
> *Crafts* vs. *Belden* (99 Mass., 535, 539).

An exactly similar decision was reached by Judge LOWELL under the Act of 1867. In that case the property had been sold free of liens and the mortgagee petitioned to have the amount realized applied on the mortgage. The Trustee resisted the application on the

ground that the mortgage had been given in fraud of the creditors. LOWELL, J., in holding that the mortgage was void, said :

> "It is plain that the money was raised for the express purpose of paying a pre-existing debt, and the intent to prefer the creditor may be fairly inferred. The only doubt is whether the mortgagee was a party to the fraud upon the creditors, or was kept in the dark by his friends."

The learned Judge found that the mortgagee had reasonable notice of the scheme and, therefore, was a party to the fraud.

Ex parte Mendell (1 Low 506 ; 4 N. B. R., 302 (Fed. Case, No. 9418).

The same point has been determined in the District of Michigan. The head-note is as follows :

> "A mortgage given by an insolvent, subsequently and within four months adjudged a bankrupt, to secure money borrowed at the time for the purpose of preferring certain of his creditors, where the creditor knew or had reason to believe that such was his purpose, is void under the Bankrupt Act, Sec. 67e."

SWAN, J., said :

> "The bankrupt's intent to prefer Littnan & Hoffstadt and the other creditors, to pay whom he borrowed the $3,500, is conclusively shown by the facts, and was known to the agent of the Trust Company. Nor is there any question but that the intent and effect of the mortgage was to hinder or delay, if not defraud, his creditors."

This was affirmed by the Circuit Court of Appeals.

In re Pease (129 Fed., 446).

The same point has been determined by Judge NEWMAN in the Northern District of Georgia.

In re Beerman (112 Fed., 663).

The mortgagee there asked leave to enforce such a mortgage. The Trustee opposed it on the ground that the mortgage was fraudulent and void.

NEWMAN, J., in sustaining the Trustee, said:

> "If transactions of this sort are to be permitted, then instead of a creditor taking a mortgage himself, when a debtor is in failing circumstances, he will get someone else to advance the money, agreeing that the person advancing the money shall suffer no loss, and thereby obtain by indirection a preference which he would be unable to get if he had acted directly with the debtor, provided of course that the debtor within four months thereafter becomes a bankrupt."

In re Beerman (112 Fed., 663–666).

The same doctrine was applied in the District of Vermont by WHEELER, J.,

In re McLam (97 Fed., 922).

And, lastly, we understand this Court to have recently expressed a similar view:

> "To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another, for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it. A 'transfer' includes 'the sale and every other and different mode of disposing of or

parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.' Sec. 1 (25) (30 Stat., at L. 545, chap. 541, U. S. Comp. Stat., 1901, p. 3420.) It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claims, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors."

National Bank of Newport vs. *National Herkimer Co. Bank* (225 U. S., 178).

It is quite true that there is a distinction between a preference and a fraudulent conveyance. That distinction is mentioned in a good many cases, which have been cited and to which we may now briefly refer. In *Coder* vs. *Arts* (213 U. S., 223), this Court discussed this distinction. There a mortgagee endeavored to prove for the face amount of the debt less the security. The Trustee objected to the claim on the ground that the mortgage was given both as a preference and as a fraudulent conveyance. The matter came up on appeal to this Court from the Circuit Court of Appeals. The latter Court made findings of fact, one of which was that the mortgage was not made by the bankrupt "with intent or purpose on his part to hinder, delay or defraud his creditors or any of them." This Court said:

"In an appeal of this character we can look only at the facts found by the Circuit Court of Appeals."

That Court had found, as we have seen, that the mortgage was not given with intent to hinder, delay or defraud the creditors. This Court, after saying that the

findings of fact did not amount to a preference, said that the matter could not be considered as a fraudulent conveyance because the essence of a fraudulent conveyance is the intent to hinder, delay or defraud creditors on the part of the bankrupt.

The present case does not rest on the negative of that proposition. The question of law here is whether there is an intent to hinder, delay or defraud creditors when the bankrupt raises money on his property for the purpose of preferring certain of them, to the knowledge or notice of the mortgagee.

So *In re Maher* (144 Fed., 503). There creditors objected to a discharge on the ground that a fraudulent conveyance had been made. They proved, however, only that the bankrupt had made payments to favored creditors, but it did not appear that the creditors had reasonable cause to believe that a preference was intended. The Court held that this did not constitute a fraudulent conveyance. The question of law presented by this case is quite different.

So with *In re Bloch* (142 Fed., 674). There a claim was objected to on the ground that a creditor had received a preference. There is no discussion as to the law of fraudulent conveyances, or anything in the case having to do with the law of fraudulent conveyances.

So with *Sergeant* vs. *Blake* (160 Fed., 57), which is cited by the Circuit Court of Appeals (Rec., p. 257).

We may add to the decisions on this subject one which is not mentioned by the Circuit Court of Appeals (*Blankmoore* vs. *Parks*, 81 Fed., 899). There the Circuit Court of Appeals for the Sixth Circuit, held that a

conveyance made in good faith by a failing debtor in consideration that the grantee assumes to pay certain of the creditors, will not be set aside as in fraud of the other creditors although the intent to prefer is clear. But the point of that decision is contained in the following from the opinion of LURTON, J.:

> "This is not evidence of fraud, nor was such preference prohibited by the law of the State" (81 Fed., p. 900).

This case was decided before the Bankrupt Act was adopted. At common law a debtor may prefer a creditor. As this Court has said, this doctrine is universal, "unless a general bankrupt law, or the law of a particular State makes the preference illegal" (*Davis* vs. *Schwartz*, 155 U. S., 631, 640). But now the Bankrupt Act forbids preferences, and hence where, as here, the purpose of the conveyance is to effect an illegal object, then the appellee cannot ask the Court to divert the appellant to the pursuit of the creditor who got the preference. The appellee, whose lack of good faith has been demonstrated, cannot thus take advantage of its own wrong.

POINT VIII.

The Circuit Court of Appeals erred in refusing to grant a new trial, instead of dismissing the bill.

The Circuit Court of Appeals determined that the findings of fact by the jury did not warrant the entry of a decree for the appellant. The remarkable feature

of this matter, however, is that the Appellate Court, instead of sending the case back for a new trial, directed that the District Court dismiss the bill.

In this the Appellate Court gave to the appellee a far greater measure of relief than it had deemed itself entitled to, or had requested. All that it had asked was a new trial. When the verdict of the jury was announced in open court the appellee at once moved for a new trial (Rec., p. 199). This was denied and an exception was taken. Afterwards an order was entered denying this motion and reciting that counsel had been heard thereon (Rec., pp. 241-2). The appeal was allowed from the order denying the motion for a new trial, as well as from the decree which was afterwards entered (Rec., pp. 245-6). The appellee continued to press the request for a new trial to the argument of the appeal. Two of its assignments of error were based on the refusal of the District Court to grant a new trial (Rec., p. 250).

The Circuit Court of Appeals, in the case at bar, did not indicate its reasons for omitting a direction for a new trial. But in another case decided at the same Term, the Court very clearly says that it does not grant new trials in cases of this sort, because such is not the proper practice.

Alexander vs. *Redmond* (180 Fed., 92).

In that case the District Court granted a nonsuit on a motion therefor by the defendant, subject, however, to the defendant's request for permission to reopen the case. The Circuit Court of Appeals held that the Court

below erred in granting a nonsuit, but instead of sending the case back for a new trial directed that a decree be entered for the plaintiff.

LACOMBE, J., speaking for the Court, said :

> " This being an appeal in equity the facts as well as the law are open for our consideration, as they would be even if the jury had rendered a verdict without direction and the issues mentioned disposed of upon the record brought here from the Circuit Court. No reservation of a motion to reopen the case extends to this Court. The circumstance that the jury was empanelled is immaterial. Appeal in equity brings the cause here for final disposition " (180 Fed., at p. 93).

In a subsequent opinion rendered on the frame of the mandate the Court said :

> " The cause did not come here upon a writ of error to review judgment following a trial at law; the proceeding was in equity and the Appellate Court in an equity cause disposes of the whole cause on the record presented to it without sending it back for a new trial. The practice of trying equity suits in the Court of first instance according to the forms of actions at law apparently invites confusion and mistakes, but that is no reason why the well-settled practice in equity appeals should be changed."
>
> *Alexander* vs. *Redmond* (180 Fed., 92, 96).

We respectfully submit two points in opposition to the view above expressed (1) that the Appellate Court had the power to grant a new trial, and (2) that it should have granted a new trial.

(1) *The Appellate Court had the power to grant a new trial.*

Whether, as with us, the issues are tried with a jury before a Chancery Judge himself, or before a common law Judge on a feigned issue, it is a well-defined rule that if the Chancery Court is dissatisfied with the verdict of the jury the proper procedure is to direct a new trial. It is true that the verdict is advisory merely and the Chancery Court is not bound to accept it. But the statement of this part is only a half truth. It is equally true that if the Chancery Judge is not satisfied with the verdict of the jury he does not dismiss the bill of complaint, but instead directs a new trial before another jury or before himself. In other words, he gives the party who has had the benefit of the jury's verdict another chance to prove his case either before a new jury or according to the equity practice. This practice was well defined prior to our separation from England, and we have not found a recorded exception up to that time.

Edwin vs. *Thomas* (2 Vern., 75).
Stace vs. *Mabot* (2 Vesey Sr., 553).
Lord Faulconberg vs. *Pierce* (Amb., 210).
Cleeve vs. *Gascoigne* (Amb., 323).

Thus in the earliest reported case (decided in 1688) we find Lord KING, L. C., directing a new trial. The report is as follows :

> "The case being now set down upon the equity reserved, it being alleged to be a case of value and concerning all the copyholds in the manor, a new trial was granted upon payment of costs."
>
> *Edwin* vs. *Thomas* (2 Vern., 75).

Lord HARDWICKE in another early case stated the practice very clearly:

> "Lord Hardwicke, Chancellor, directed the second issue to be tried again; and said this Court in that respect will go farther than courts of law can; however if a verdict is not against evidence, as this was not, court of law cannot grant a new trial; but court of equity will in order to have justice done; for the verdict must be such as will satisfy the conscience of this Court."

Lord Faulconberg vs. *Pierce* (Amb., 210).

In another case Lord HARDWICKE states at great length the practice which had become common in his time. He said:

> "And this Court directs issues to be tried at common law to inform the conscience of the Court as to facts doubtful before; and, therefore, expects in return such a verdict and on such a case as shall satisfy the conscience of the Court to found a decree upon; if, therefore, upon any material or weighty reason the verdict is not such as to satisfy the Court to found a decree upon there are several cases in which this Court has directed a new trial for further satisfaction notwithstanding it would not be granted if in a court of common law."

Stace vs. *Mabot* (2 Ves. Sr., 553).

In a later case Lord ELDON states the same rule as follows:

> "There is this difference between a motion for a new trial in a court of law and in a court of equity. In a court of law if the jury find the fact, although the Judge may think differently, yet it is permitted to stand for the finding of fact as the province of the

jury; but here the verdict is something more than the verdict of the jury; it must be such as to satisfy the court that it can make that its own declaration of the fact which the jury have made therein."

East India Co. vs. *Bazett* (1 Jac., 91).

The same power lies with the Appellate Court, which really sits merely as a court of review. In considering the matter, it acts just as the Chancellor below; and so, in the case of a verdict on framed issues, the Appellate Court should grant a new trial if the Chancellor below should have done so. So well established is this principle, that this Court has carefully stated the precise method in which an appeal can bring up the question whether the lower Court should have adopted the verdict.

Watt vs. *Starke* (101 U. S., 247).

(2) *A new trial should have been granted.*

It is quite true that, as Mr. Justice STORY has said :

"The verdict upon an issue, directed by a Court of equity, is in no just sense final upon the facts it finds, or binding upon the judgment of the Court. The Court may at its pleasure set it aside and grant a new trial; or disregarding it may proceed to hear the cause and decide in contradiction of the verdict; or it may adopt the verdict *sub-modo* and give it a limited effect."

Allen vs. *Blunt* (3 Story, 742; Fed. Case No. 216).

On the other hand, the cases are rare where *on merely one verdict* the Court gave judgment to the contrary on the facts elicited before the jury. An illus-

trative case is *Clyde* vs. *Richmond & Danville R. R.* (72 Fed., 121). There an employee of the receivers filed a petition for damages for negligence. The Court sent issues to the jury, which found a verdict for the petitioner. The Court set aside this verdict and granted a new trial, and the jury again rendered a verdict for the petitioner for the same amount. The trial Court set aside this verdict and remitted the matter to the equity side. In that Court, another Circuit Judge presiding, the petitioner moved the Court to confirm the verdict. The Court, upon the petition, and the evidence adduced at the two trials, held that the petitioner had no cause of action and dismissed this petition. This was affirmed by the Circuit Court of Appeals. The Court said :

> " Under any circumstances and in a doubtful action the concurrent opinion of two Judges who heard and examined this case would be entitled to great weight. A review of this testimony induces us to concur with them " (72 Fed., at p. 124).

In *Watt* vs. *Starke* (101 U. S., 247), this Court in one place says that a single verdict may be disregarded and a decree rendered contrary to it (101 U. S., 252). But the case it cites (*Basey* vs. *Gallagher*, 20 Wall., 670) was where the jury had made special findings of fact and both sides moved for a decree. Here, on the contrary, the defendant itself asked for a new trial.

Some latent air of criticism may be found in the opinion rendered by the Circuit Court of Appeals with regard to the practice which has become common in the Southern District of New York of summoning juries to aid the Court in this class of cases. But

we respectfully venture to suggest that the course adopted by the Judges of the District Court is commended by the soundest precedents. We have only to glance at any of the old reports and books of equity practice to discover that the Chancellors invariably sent to the jury questions involving legal title. Now while an action to set aside a fraudulent conveyance is generally of equitable cognizance it must not be forgotten that the plaintiff in reality is seeking to establish a legal title to property conveyed. The Statute of Fraudulent Conveyances makes a transfer in fraud of creditors void, that is, it provides that the legal title does not pass by such an attempt. Therefore, if the property itself can be located the defrauded creditor or trustee in bankruptcy can physically take it, because he and he alone has the title. The jurisdiction of equity, therefore, is really in aid of a legal title instead of being independent. So late as the case of *Cohen* vs. *U. S.* (157 Fed., 651), we find the very Circuit Court of Appeals which refused a new trial in this case saying that *even in a criminal action* the title to property conveyed in fraud of creditors cannot be considered as passing. The Court in that case, speaking by NOYES, J., says :

> "The defendants urge that between the parties to the mortgage the title had passed from the corporation to the mortgagee, and, therefore, that the bankrupt did not conceal the property for the reason that it had no legal title thereto. But we are not called upon to consider questions of title under chattel mortgages and forclosures. If the jury found, as they evidently did, that the whole thing—the mortgage

and the foreclosure—was a pretense and a sham, then there was no mortgage, no foreclosure and no passing of title."

Cohen vs. *U. S.* (157 Fed., 651, 655; Writ of Certiorari denied, 207 U. S., 596).

Therefore a bill to set aside a conveyance as in fraud of creditors peculiarly presents issues which should be sent over to be tried by a jury, because after all is said and done it tenders a question of legal title. And so this Court has decided.

McLaughlin vs. *Potomac Bank*, (7 How., 220).

Let us remember, too, that until within late years almost all actions to set aside fraudulent conveyances were, in fact, brought in the common law courts. We will not inflict the Court here with statistics, but we may confidently assert that from an examination of a great number of cases in England prior to the time of Lord ELDON, the majority of reported cases where fraudulent conveyances were considered are to be found in the common law courts. Juries, not Appellate Courts, were the historical triers of such issues of fact.

Even where testimony has been taken under the Equity Rules, and both sides have closed their proofs, it is a well-settled practice to send the case back for further proofs if the Appellate Court believes that a final decree, on the record before it, would work injustice.

Eltho vs. *Lear* (7 Pet., 130).
Gas Co. vs. *Peoria* (200 U. S., 48, 54).
Barber vs. *Coit* (118 Fed., 272).

Ill. Cent. R. R. vs. *Illinois* (146 U. S., 387).

Stand. Comp. Scale Co. vs. *Computing Scale Co*, (145 Fed., 627).

Chi. R. R. vs. *Tompkins* (176 U. S., 167).

POINT IX.

For the reasons stated we respectfully ask that the decree of the Circuit Court of Appeals be reversed. The decree of the District Court should be reinstated, with costs in all Courts, or the cause should be remanded to the District Court for a new trial. In any event the decree of the Circuit Court of Appeals is wrong to the extent of $1,000 and interest, for the reasons given in our 6th Point, and should be reversed pro tanto.

Dated December 6, 1912.

Respectfully submitted,

ABRAM I. ELKUS,
GARRARD GLENN,
Counsel for Appellant.

FILED.
JAN 14 1913
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

ROBERT VAN IDERSTINE, AS TRUSTEE IN BANKRUPTCY OF ABRAHAM FELLERMAN AND ISIDOR J. FELLERMAN, INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF A. FELLERMAN & SON,

Appellant,

vs.

THE NATIONAL DISCOUNT COMPANY,

Appellee.

October Term, 1912.
No. 136.

REPLY BRIEF FOR APPELLANT.

ABRAM I. ELKUS,
GARRARD GLENN,
Counsel for Appellant.

BYRNE & BIEGRIST, LAW PRINTERS, 149-155 WORTH ST., NEW YORK

IN THE

Supreme Court of the United States.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of ABRAHAM FELLERMAN and ISIDOR J. FELLERMAN, individually and as members of the firm of A. Fellerman & Son, *Appellant,* *vs.* THE NATIONAL DISCOUNT COMPANY, *Appellee.*	October Term, 1912. No. 136.

REPLY BRIEF FOR APPELLANT.

It is true that the elder Fellerman had been in business for about seventeen years and that the firm was rated in Dunn and Bradstreet's agencies as being worth fifty or seventy-five thousand dollars, and in good credit. But these facts do not help the appellee when taken in connection with the fact that during all these years Fellerman had never had previous occasion to borrow money on his accounts receivable and

had always previously been able to borrow as much money as he needed from the banks. Why should Fellerman, who had been in business for seventeen years, had a good rating, and had always, as he expressed it, been able to borrow money from the banks thousands and thousands of times over his own signature, go to a new concern, in business but a short time, not qualified under the banking laws of New York, to borrow money on his accounts receivable and pay more for the loan than any bank would charge?

The appellee answers that Fellerman stated at the first conversation, according to the appellee's witness Levison, that he wanted to make an arrangement to finance the business of the firm, attending to the collection of bills, and in short, as expressed by the appellee, to have the latter act as his credit department. But it is also true that the appellee agreed to do no such thing; that the agreement which was offered to Fellerman for his signature did not bind the appellee to do anything of the sort. It is also true that although the appellee very graphically describes the practice which it had worked out in the case of customers who failed (and there seem to have been many of them, even during the short period in which the appellee Company had been in existence), no method seems to have been worked out for acting as a credit department for customers who borrowed money on their accounts receivable. It must therefore be noted that the only excuse furnished for this transaction utterly failed. It was not contemplated in the contract, and the appellee was not bound thereby to do any of the things the attainment of which, according to this

theory, was the object of Fellerman's transactions with the appellee.

The appellee's brief states that a check was given to Fellerman by the appellee, that he received the amount of this check and deposited it in his bank (see Appellee's Brief, p. 5). But how was this done? True, a check was first prepared, but it was not used. Instead it was cashed and the cash was used by Fellerman. It is true, as stated by the appellee, that as the assignment of the accounts was stamped on Fellerman's ledger, after the latter's failure his creditors could easily learn that the National Discount Company owned the accounts (Appellee's Brief, p. 32). But it is also true that the proceeds of that loan could not be readily traced. If, as would have been done had this been a usual transaction, Fellerman had been given a check and had deposited it in his bank, the proceeds could have been easily traced. But that was not done; cash leaves no trail, as we here repeat.

The object of Fellerman was to conceal the proceeds of the loan, not the fact of the loan. The appellee lent itself to his purpose, feeling safe in its possession of the security.

If the appellee's counsel seriously mean to argue, as we gather from their brief, that their client's charges were not extortionate, they differ from the Circuit Court of Appeals, for that Court stated most emphatically that the bargain which the appellee made with Fellerman was "onerous and oppressive * * * harsh and oppressive" (Record, p. 258).

It is true that the charges of Nathan were all made

subsequent to the failure, but they were incurred before and could not have been made until then. The failure came so close to the time of the loan that there was not time to make them earlier. The fact is that they were made, that practically no service was rendered for these charges, and that Nathan was very close to the appellee Company.

It is true that the assigned accounts were not all of the assets of Fellerman and that he had a small amount of assets remaining applicable to the payment of his debts. But what difference does that make when we consider the fact, as stated by the Circuit Court of Appeals and the District Court, that at the time of these transfers Fellerman was "hopelessly insolvent"? Such things must be taken with a sense of perspective. A man hopelessly insolvent has no right, under the bankruptcy law, to prefer certain of his creditors over the others. It does not matter whether, when he has finished doing that, some pittance remains for the other creditors or not. Nor can he answer, nor can anyone who in bad faith helps him in such matter answer, that there is something left for the other creditors. That is not the point. As stated by this Court a great many years ago, if the appellee had reason to believe that the necessary effect of its conduct was to prevent a proper distribution of Fellerman's property among his creditors under the law, then the appellee is not acting in good faith (*Gibson* vs. *Warden*, 14 Wall, 249).

And the same sense of perspective is necessary in dealing with the appellee's contention on the law. It is true that at common law, in the absence of bankrupt

legislation, a debtor in failing circumstances, however hopelessly involved, has the right to prefer one creditor over another, and that is all the New York cases cited by the appellee hold. But that is not a proposition to be seriously urged here, because it was to cure that very evil in the common law that bankruptcy statutes were adopted. And whenever you have a bankruptcy act you cannot find any Court that will say that the common law right of a debtor to prefer a creditor continues to exist. It is no answer to a direct fraud upon a bankrupt act to say that if there had not been a bankrupt act you could have committed it with impunity. The same answer would apply to any violation of the Married Woman's Property Act or any attempted violation by a bank cashier of the embezzlement statutes. At common law a husband owned all of his wife's personal property and embezzlement was not larceny, but it was to cure just such defects in the common law that the Married Woman's Property Acts and the embezzlement statutes were adopted in both England and this country. You cannot with such an argument transport the Court in imagination to the time of Henry VII (the first Bankrupt Act was passed in the time of Henry VIII) and ask it to judge everything by the standards of those times, any more than you can ask the Court, in considering a real estate question, to place itself *en rapport* with the King's Bench as it was before the adoption of the Statute of Uses. We must take the conditions as they are; and the object of the Bankrupt Act, as this Court and all other Courts have said, is to secure equality of distribution among cred-

itors. That object could be easily frustrated if certain devices, left untouched by the ancient common law, were permitted to continue. But the consistent course of judicial decision since the earliest of the bankrupt acts has been to consider any device which interferes, or even tends to interfere, with the equal distribution of an insolvent trader's effects as unlawful (*Gibson* vs. *Warden*, 14 Wall., 249). Such a device is a general assignment, however valid it may be, at common law (*West Co.* vs. *Lea*, 174 U. S., 590). The present arrangement is of even more vicious character. Shall it stand?

It is true that a preference is different from a fraudulent conveyance, but that is not an answer to the question which this case propounds. If you sue a man on the theory of fraudulent conveyance and it turns out that he has only received a preference, then there may be such a difference between your pleadings and proofs that your bill will be dismissed. But that is not the proposition in this case. We sue on the theory of a fraudulent conveyance, and thus tender to this Court the question whether a conveyance made by a bankrupt with the intention to use the proceeds in committing a violation of the Bankrupt Act in preferring certain of his creditors over others is not such a fraudulent act as in effect would be a fraudulent conveyance. We have cited cases to that effect showing that the majority of judicial opinion in this country is in favor of answering that question in the affirmative. It will not do to answer that by showing how a preference is different from a fraudulent conveyance. The Courts whose decisions we cite in our main brief have gone past that;

they have considered all that, and they have held, as we have shown, that a conveyance for the purpose of using the proceeds to prefer creditors is a fraudulent conveyance. If this Court holds to the contrary then of course the law is established to the contrary, but the weight of opinion, as well as the previous views of this Court as expressed on other occasions, would have to be overruled.

What is there left in this case, once we have Fellerman's hopeless insolvency and the application which he made of the proceeds derived from this conveyance? Merely the question of the appellee's bad faith. That has been submitted to a jury under proper instructions, and the jury found against the appellee. It was submitted to the learned Judge on the application for a new trial, and he found against the appellee; and it remained for the Circuit Court of Appeals to say that the only thing showing the appellee's lack of good faith was that he was put upon inquiry by Fellerman's desire to obtain a loan, and that in order to obtain that he acceded to onerous and oppressive terms. But we have already shown and we submit that the appellee has not answered many other facts besides that single one going to show the appellee's lack of good faith.

A merchant, seventeen years in business, desires to obtain a loan on his accounts receivable from a perfectly strange company which has only been in business a short time. In order to do that he is willing to pay a commission aggregating forty per cent.; he takes the loan in cash, although a check is drawn; a few days later he comes again for another loan on more accounts

and desires to draw down as well all the possible margin allowed him on the first. The appellee refuses that because he has not received confirmation of the accounts, yet this does not show the appellee's ~~bad~~ faith but simply a desire to have good collateral. The appellee loans him, however, as much as it feels it can risk on the margin, and then a few days afterwards he fails. The appellee has an opportunity to examine the merchant's books, but does not do so. The appellee's President states that it is his custom to examine fully into the circumstances of those who desire to borrow money from it, but the appellee here does not inquire at all. All the appellee does is to look up the merchant's rating, and its President testifies that nothing else is necessary. There is evidence that the appellee advised the bankrupt to purchase stock in the appellee's company with the money. There is evidence that the business which the appellee does is principally in cash. The appellee can hardly be considered as intending to conduct a legitimate banking business when we consider that its President and controlling spirit has hitherto been a shawl manufacturer and that there is apparently not a man in its force who has ever had any banking experience. What legitimate function can the appellee fulfill in a mercantile community? What possible legitimate purpose could this merchant, of seventeen years' standing, have had when he endeavored to do business with the appellee? What possible explanation can the appellee give of the matter? What explanation does it give? All these points, with many others, are considered in our principal brief.

It is not correct, as stated by the appellee, that the learned trial Judge gave no independent consideration to the evidence. It is more likely true that the learned Circuit Court of Appeals, in its interest in the question of law which it conceived that the record presented, gave less attention to the evidence than the lower court. And when a jury, drawn from a mercantile community like New York, after seeing and hearing the appellee's President with his explanation of how this transaction came about, and the bankrupt with his explanation of it, holds, under the instructions of the Judge, that there was fraud in this transaction, and there is evidence to support its finding, is it for the Appellate Court to say that there was not?

Assume that some of the evidence in this case did not bind the defendant, such as the evidence of the Stitch and Gordon transfers and the evidence as to the lawyer who mysteriously appeared when the transactions were completed. There is enough left in the record to sustain the findings of the jury. Certainly the first of these transactions was admissible to show the bad faith of Fellerman. If Levison acted in good faith it was harmless, and if he acted in bad faith it bound him. Whether disregarded or not, the record shows, we submit, the bad faith of this transaction, leaving only the naked question of law above mentioned.

The appellee differs with us as to whether the second payment made to Fellerman was used in preferring creditors. The references to the record which he gives do not show any clear testimony of Fellerman one way or the other. The Circuit

Court of Appeals seemed doubtful on the question, saying: "It seems that most, if not all the other money was used to pay favored creditors" (Record, p. 256). But whether we be right or the appellee right on that point, the contention illustrates the practical injustice which was done by the Circuit Court of Appeals in refusing to direct a new trial, although the appellee had conceived itself entitled only to that relief. We could not go into an accounting on the jury trial as to the disposition of the consideration received by Fellerman. The learned trial Judge considered it immaterial, as we have already shown in our principal brief, and if it has become material then we should have our day in court to bring these matters out in a proper proceeding. From all this we are shut off by the decree of dismissal. The appellee cites no authority against those which we bring forward on this question that the Circuit Court of Appeals had the power to grant a new trial and should have granted it. Of the cases cited by the appellee (Brief, p. 11), we have discussed two in our principal brief, and in the other two, *Oil Well Supply Co.* vs. *Hall* (128 Fed., 875) and *Johnson* vs. *Harmon* (94 U. S., 371), the Appellate Court affirmed the decree below, and therefore the point here of interest did not arise.

Dated January 8, 1913.

Respectfully submitted,

ABRAM I. ELKUS,
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Counsel for Appellant.

JAN 8 1913
JAMES H. McKENNEY,

United States Supreme Court

October Term, 1912.—No. 136.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, individually and as members of the firm of A. Fellerman & Son,

Complainant-Appellant,

against

THE NATIONAL DISCOUNT COMPANY (Impleaded),

Defendant-Appellee.

Brief for Defendant-Appellee.

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1913

United States Supreme Court

OCTOBER TERM, 1912.

ROBERT VAN IDERSTINE, as Trustee in Bankruptcy of Abraham Fellerman and Isidore J. Fellerman, individually and as members of the firm of A. Fellerman & Son,
Complainant-Appellant,

against

THE NATIONAL DISCOUNT COMPANY (Impleaded),
Defendant-Appellee.

Brief for Defendant-Appellee.

GENERAL STATEMENT.

This is an appeal by the complainant from a decree for the defendant dismissing a bill in equity filed in the United States District Court for the Southern District of New York by complainant as trustee in bankruptcy of the firm of A. Fellerman & Son to set aside the transfer of certain accounts herewith made by the firm to the defendant, and to recover the moneys collected therefrom by this defendant.

The bill of complaint alleges that August 15th, 1905, the bankrupts executed a certain agreement with the defendant, a copy of which is set forth, and that pursuant to that agreement certain accounts receivable were on August 15th, 1905, and on August 18th, 1905, transferred by the bankrupts to the defendant, and that the defendant advanced to the bank-

rupt on the security of the accounts so transferred the sum of $4,006.33, the aggregate amount of the accounts being $7,727.89.

The bill further alleges that said transfers of accounts "were made with the intention on the part of said bankrupt, and in pursuance of a fraudulent device and scheme on their part, to hinder, delay and defraud their creditors, and were a part of a fraudulent scheme and conspiracy entered between them and the defendant to hinder, delay and defraud creditors of said bankrupt; and defendant had full knowledge of said fraudulent intention and was not a purchaser in good faith of said accounts, nor did it pay a present fair consideration."

The cause was tried before the Hon. Geo. C. Holt, District Judge, with a jury, and the decree recites that the jury were "empanelled to aid the Court in finding a determination of the facts" (p. 240) and that the Court had "accepted and adopted the findings of the jury as its own."

It is apparent from the proceedings at the trial as appears by the record, that the cause was submitted to the jury as if it had been an ordinary action at law, triable by a jury, and that the verdict of the jury was accepted by the Court as conclusive, and without giving any independent consideration of the evidence.

At the close of the evidence the defendant made a motion to dismiss the bill, but the Court ruled there was a question for the jury and denied the motion (p. 80).

After the rendition of the verdict the defendant asked to set aside the verdict as against the evidence and for a new trial, and the motion was denied without argument (p. 199).

A decree was entered in the District Court for the complainant for the recovery against the defendant of the sum of $5697.47, together with costs.

The defendant appealed to the United States Circuit Court of Appeals for the Second Circuit from that decree and that Court, after due consideration, reversed the decree and ordered a decree dismissing the bill with costs of both courts to be paid by the complainant. From the decree entered upon the mandate of the Circuit Court of Appeals the complainant has appealed to this Court.

Statement of Facts.

Fellerman & Son were manufacturers and sellers of cloaks and suits at No. 7 East Seventeenth Street, New York City. The elder Fellerman had been in that business for fifteen or sixteen years. The firm was in good financial standing, and was rated by both Dun and Bradstreet's Commercial Agencies as being worth from $50,000 to $75,000, and as being in good credit (p. 107).

The defendant was a Maine corporation, doing business at New York City, engaged chiefly in financing merchants by advancing money upon their outstanding customers' accounts. It had a paid up capital stock of $75,000 preferred and $75,000 common (p. 105). The agreement of August 15th annexed to the bill was the ordinary printed form which was customarily taken by the defendant from its customers and shows the manner in which the defendant generally transacted its business. It provides among other things that "the customer shall deliver to the banker a correct original and duplicate invoice for goods actually sold and delivered, and an assignment of the account upon the form attached hereto." It further provides "that the banker will credit the customer with all sums of money realized from the collection of accounts, and that the accounts transferred and assigned to the banker to be

held as general securities for all advances claimed and demands of the customer." It also provides that the "customer agrees to pay to the banker in cash or allow the banker to retain from any moneys collected upon the accounts of the customer a commission of five per cent on the gross amount of the accounts of the customer to reinburse the banker for services rendered or to be rendered in the collection of the accounts, in assisting in extending credit, securing references and reports, and generally assisting the customer with his credit department." It further provides that as to the accounts transferred to the banker the customer "will have this transfer properly entered in his ledger, stating that this account is the property of the National Discount Company" (pp. 204-207).

It appeared in evidence that a few days prior to August 15, 1905, the defendant was called upon at its place of business by Abraham Fellerman, the senior member of the bankrupt firm, for the purpose of obtaining some advances of money. He introduced himself to Mr. Levison, the president of the defendant, and conversation ensued between them which is detailed by Mr. Levison at pages 106-107. The substance of the conversation was that Fellerman wanted the defendant to make an arrangement for the financing of the business of the firm, attending to the collection of bills, etc., etc. Levison stated in a general way the terms upon which defendant did business, handed Fellerman one of the printed contracts and told him to take it home and read it over, and promised to look into their business.

A day or two later Fellerman called again upon the defendant, accompanied by Mr. Solomon, who was a stockholder of the defendant (p 86). Solomon was a manufacturer of clothing, and for many years had sold goods to Fellerman, and had been accustomed oc-

casionally to lend him money; and on the day in question Fellerman had applied to him for a loan to meet a note, but Solomon had told Fellerman he was not in funds to make so large a loan as was needed, and suggested that Fellerman apply to the National Discount Company (p. 86). As a result of the conversation Solomon went with Fellerman to the defendant, and informed Mr. Levison, the president, that Fellerman was an old friend, that his concern was a good and reliable one, that Fellerman needed some money, and that Solomon would appreciate it if Levison would make the loan (see Solomon's testimony, pp. 86 and 87). After Solomon left, Levison and Fellerman had further conversation on the subject of certain modifications of the printed contract which Fellerman had taken away for examination (p. 108). In the meantime Levison had examined Fellerman's rating in the commercial agency books and found it to be from "fifty thousand dollars to seventy-five thousand dollars good" in Dun's, and in Bradstreet's to be "fifty thousand dollars to seventy-five thousand dollars fair" (p. 107).

The next day, August 15th, Fellerman called again upon the defendant, told Levison that he had a note of $3,000 to meet that day and asked for an advance of that amount. He had brought with him customers' accounts amounting to $5,232.39 (p. 108). Although it was not customary for the defendant to make advances on accounts until their correctness had been confirmed by the customers, Levison, influenced by what Solomon had stated, and by the rating of Fellerman & Son in the mercantile agency books, consented to make the advance. Thereupon a check for $3,000 was made out to the order of Fellerman & Son by defendant's bookkeeper. Fellerman received the amount of this check and deposited it in his bank account, where it was used to pay his note of $3,000, endorsed

by one Levine (pp. 49 and 50). At that interview Fellerman signed the contract set forth in the bill of complaint. On the same day the defendant sent one of his clerks to Fellerman's place of business and had the accounts stamped on the ledger of the firm, pursuant to the usual course of business of the defendant (pp. 94-95, 114-115). Immediately thereafter the defendant notified the customers whose accounts had been assigned to it, pursuant to its usual course (pp. 111-112).

The foregoing are the material facts concerning the first of the two advances which by the decree of the District Court the defendant was adjudged to repay as made to defraud the bankrupt's creditors.

On August 18th Fellerman again called on the defendant, bringing with him his customers' accounts aggregating $2,379.30 and applied for another advance to enable him to meet firm obligations (p. 113). As the defendant had not yet received the confirmation answers from the customers whose accounts the firm had previously transferred to it, Mr. Levison refused to advance the usual 75 per cent of the net amount of the accounts (p. 113). The defendant did, however, advance to the firm something like $1,000 (p. 114). In other respects this transaction was similar to the first. Fellerman & Son used the amount of the second advance to pay employees and other debts (pp. 40-58). By the decree the defendant was adjudged to repay this amount likewise as a transaction in fraud of a bankrupt's creditors.

The day after this second advance, and on August 19, 1905, a petition in bankruptcy was filed against Fellerman & Son by their creditors on which they were subsequently adjudicated bankrupts.

It is undoubtedly true that at the time these two advances were made Fellerman & Son were insolvent,

and that the moneys procured from the defendant were obtained by the senior Fellerman for the purpose of making preferential payments to favored creditors of the firm.

Shortly after a trustee in bankruptcy was appointed, the defendant was called upon to make a statement of the amounts collected upon the accounts transferred by the bankrupts, and this request was promptly complied with. Prior to the bringing of this suit the defendant paid over to the trustee the balance of the sum collected upon the accounts, after deducting its advances, interest and attorney's charges for collection, together with the remaining uncollected accounts (pp. 114, 115, 118, 119, 166, 169, 171, 18; Defendant's Exhibits A, B, C, F, pp. 222-225).

There was some evidence that before the defendant made the second advance to the bankrupts a suggestion was made as to the giving of a guarantee by a man named Schiller, but it is not clear whether or not such guarantee was ever delivered or reached the defendant (pp. 150, 151, 156). It was further shown that after assigning the accounts to the defendant the bankrupts had left on their books good outstanding accounts amounting to about $6,000 (pp. 34, 214), and that they made successive transfers, first to one Gordon and another to one Stich, of these outstanding accounts, and that on the same day Fellerman consulted an attorney with regard to their financial condition (pp. 41, 43). The defendant knew nothing about these subsequent transfers to Gordon and Stich (p. 55).

There was no evidence in the case tending to show that the defendant had any knowledge or information about the financial circumstances of the bankrupts at the time of the transfers other than the statement of Fellerman to the effect that the firm was worth from $60,000 to $70,000, the statement of Solomon that

they were a good, reliable concern, and the rating in the commercial agency books.

There was not a scintilla of evidence given that defendant had any knowledge or information that Fellerman had any other purpose in view in obtaining the advances than to pay some of the pressing business obligations of the firm. The fact is undisputed that all the moneys advanced by the defendant to the bankrupt were used by the latter in paying their debts (pp. 49, 50, 32, 40, 58).

The only evidence in the case which furnished a suggestion in the Court below militating against the entire good faith of the defendant consisted of testimony by Fellerman that during his interviews with Levison the latter suggested that he could buy stock in the defendant with his equity in the accounts transferred (p. 60). Fellerman was to some extent corroborated in this statement by Woerbling, a prospective son-in-law of Fellerman. As Judge Holt indicated in his remarks to the jury the circumstance, if it had been true, would not be of any particular weight. This is the Judge's comment upon it:

> "Then there is evidence given by Fellerman in substance to the effect that while they were talking about this matter, Mr. Levison, the president of the defendant, said to him that he might purchase some stock in the defendant company; he would issue stock to him then, as I understood it, and that it would be paid for by the equity in the accounts when they should be collected; and Fellerman says that Levison said he could turn over that stock to his wife or daughter. Now, Mr. Woerbling testifies that he (Fellerman) did make the suggestion of selling the stock, but he says he didn't hear any suggestion of turning it over to the wife or daughter. The defendant denies that any such conversation took place. It is to me questionable whether if this had been done it would

> have been a very clever scheme to conceal the hiding of property; there would be the stock issued and it would be investigated. The trustee in bankruptcy would naturally call upon the defendant for the proceeds arising from the equity in the account and if the National Discount Company should say, 'we bought this equity' the trustee would ask, 'with what,' and then the answer would have to be, 'with the stock,' and there would have been the stock and it would have been easily traced. But it is for you to say whether there was any such suggestion, and if it was made whether it indicates any knowledge or suspicion on the part of the defendant's president" (p. 192).

The same view of this evidence was taken by the Circuit Court of Appeals. In the opinion of Judge Noyes (p. 258), he states:

> "Substantially the only direct evidence showing any want of good faith upon the part of the defendant is the testimony that Levison suggested that Fellerman use the equity in the accounts to buy stock in the defendant's corporation which could readily be turned over to members of his family. But the testimony concerning this statement is not wholly satisfactory. Moreover if Levison made it as Fellerman testifies, it must have been made, according to the same testimony, in ignorance of the condition of Fellerman's affairs. Fellerman, when called by the complainant, testified that he did not disclose his financial situation to the defendant."

An argument was made, and seemed to have some weight with Judge Holt, that a circumstance of suspicion militating against the good faith of the defendant was supplied by the fact that the defendant had charged excessive commissions to the bankrupts by the terms of the agreement. Judge Holt at first was inclined to regard this as of no importance (see his

observations at p. 76). But he finally instructed the jury, that it was for them to say what weight was to be given to that fact (p. 191). It was undisputed that defendant's charges to Fellerman were its customary charges in such transactions and there was no evidence that other bankers made any different charges (pp. 120, 106, 109).

An argument was also made that the defendant knew that Fellerman was selling out to the defendant all the firm's accounts. There was no evidence to this effect. And it appeared without dispute that several thousand dollars worth of accounts remained and were subsequently sold (pp. 34, 41, 214) by the firm to Gordon and Stich without the knowledge of the defendant (pp. 120, 54-56). It was also shown that the bankrupt had a large amount of other assets at the time of the failure (p. 190). The only evidence touching upon the question was given by Fellerman's bookkeeper, his daughter, and was to the effect that when the defendant's clerk came to have the accounts transferred on the books of the firm he saw all the credit accounts upon the ledger (p. 35). Mr. Lewis, defendant's bookkeeper, testified that he simply concerned himself with the accounts that had been transferred to the defendant (p. 95).

The case seems to have been decided by the jury upon the theory that the bankrupts obtained the advances when they were insolvent and about to fail, for the purpose of preferring some of their favored creditors, and that although there was no evidence showing bad faith on the part of the defendant, the defendant was guilty because its president ought to have ascertained what Fellerman's real condition was before making the advances.

The trial judge instructed the jury that the transfers were made by the Fellermans with the purpose to hinder, delay and defraud their creditors if they were

made to obtain moneys to be used for preferential payments to favored creditors (p. 190).

POINT I.

Undoubtedly the Court can in an equity case, at its discretion, submit the facts to the consideration of the jury; but when this is done the verdict is merely advisory, and it is the duty of the Court to give an independent judgment upon its own consideration of the testimony.

There can be no decree for a complainant unless the Court is satisfied that the facts in issue have been established in his favor by a fair preponderance of evidence.

Although erroneous rulings or instructions cannot be reviewed, the question upon an appeal in an equity suit is whether upon all the evidence the decree was right. The verdict of a jury is not controlling, but is advisory merely. And if the Court is not satisfied with the verdict upon a full consideration of the evidence it will order such a decree as the facts warrant.

Oilwell Supply Co. vs. Hall, 128 F. R., 875.
Johnson vs. Harmon, 94 U. S., 371.
Watt vs. Stark, 101 U. S., 247.
Basey vs. Gallagher, 20 Wall., 670.

POINT II.

There was no cause of action proved and the direction by the Circuit Court of Appeals to dismiss the bill of complaint was correct.

We shall discuss this point under two heads.

(1) That neither under the Bankruptcy Act nor the laws of the State of New York, in any view that might be taken of the evidence was any cause of action established against this defendant.

(2) Even if there had been any proof of a fraudulent intent on Fellerman's part or if the Trial Judge had been right in his view of the law, there was no evidence of any want of good faith on the part of defendant, or to justify a finding that the defendant knew or had reason to believe at the time it made the loans to Fellerman that he was insolvent and therefore there was no cause of action against defendant.

The Circuit Court of Appeals stated that two elements must appear in order to justify a decision in favor of complainant:

1. An intent upon the part of Fellerman & Son to hinder, delay or defraud their creditors.
2. Want of good faith upon the part of defendant (Record, p. 256).

A discussion of these two elements is made under the two headings above noted.

First.

In submitting the case to the jury, the learned Trial Judge in his charge stated the principles of law which

he considered as applicable to the facts in the case and under which principles of law the verdict was to be rendered. The Court's charge constitutes, therefore, its opinion and its conclusions of law concerning the case.

The Court charged that the action could be maintained under two provisions of the Bankruptcy Act (pp. 188-189), Section 67-e and Section 70-e, and further charged that the laws of the State of New York are similar to the first provision in Section 67-e of the Act and were applicable to the facts in the case at bar. It also charged that the payment by a failing debtor of a legitimate debt thereby creating a preference in favor of said creditor has the same effect under the Bankruptcy Act as if the debtor had turned the property into cash and hidden or concealed it for his own purposes (p. 190), and although specifically asked to charge that it was not fraudulent for the defendant to advance moneys to Fellerman to be used by him in paying legitimate debts, although by receiving such payments these creditors thereby received a preference over other creditors (pp. 197-8), the Court declined so to charge. The entire charge was based upon the Court's theory repeatedly stated, that the payment by an insolvent debtor of a legitimate debt to any creditor with intent to prefer him was a transfer within the meaning of the Bankruptcy Act and State laws for the purpose of hindering, delaying and defrauding creditors. These rulings of the Court were duly excepted to (pp. 195-197).

It is clear that under the language of the Bankruptcy Act itself and under the authorities the Trial Court's views were wholly erroneous. It was wholly undisputed in this case and in fact the proof was brought out by the plaintiffs that every dollar which Fellerman obtained from this defendant was used by him in paying legitimate debts of his business (pp. 49-50). The first $3,000 was used in the payment of a

note made by Fellerman and discounted in the usual manner with his business bank, and the remaining money was deposited in his bank and checked out in payment of various legitimate debts such as rent, labor and bills of merchants (pp. 32-40-49). The Trial Court recognized that this was the fact (p. 190), as did also the Circuit Court of Appeals. That payment by a failing debtor of a legitimate debt, even though he thereby intends to create a preference, is not a fraud under the Bankruptcy Act and does not come within the provisions of Sections 67e or 70e of the Bankruptcy Act is well settled. Section 67e applies only to transfers which are fraudulent at common law and does not apply to preferential transfers. *In re* Bloch, 142 Fed., 674, 676, 677; Githens vs. Schiffler, 112 Fed., 505. In Coder vs. Arts, 152 Fed., 943, the Circuit Court of Appeals for the 8th Circuit said:

> "A transfer made in good faith to pay or to secure an honest antecedent debt by a insolvent within four months of the filing of a petition in bankruptcy by or against him, constitutes no evidence of an intent on his part to hinder, delay or defraud other creditors within the meaning of section 67-e of the Bankruptcy Law, notwithstanding the fact that its necessary effect is to hinder and delay them and to deprive them of the opportunity they might otherwise have had to collect their claims in full."

This case was affirmed by the United States Supreme Court where the Court at length reviews the authorities and stated:

> "A consideration of the provisions of the bankruptcy law as to preference and conveyances, shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have

the effect prescribed in Section 60, enabling one creditor to obtain a greater portion of the estate than others, of the same class, is not necessarily fraudulent; preferences are set aside when made within four months, with a view to obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference. In construing the bankruptcy act this distinction must be kept constantly in mind. As was said in Gitens v. Shiffler, 112 Fed. Rep., 505: 'An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one.' *In re Maher*, 144 Fed. Rep., 503-509, it was well said by the District Court of Massachusetts:

" 'In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual, the bankrupt has secured an advantage for himself out of what in law should belong to his creditors and not to him. * * * We are of the opinion that Congress in enacting S. 67 E and using the terms "to hinder, delay or defraud creditors," intended to adopt them in their well known meaning as being aimed at conveyances intended to defraud.'

"In Section 60 preceding, preferential transfers are defined and the terms on which they may be set aside are provided; in S. 67 E, transfers fraudulent under the well recognized principles of the common law and the Statute of Elizabeth are invalidated."

Coder vs. Arts, 213 U. S., 223.

Under the laws of the State of New York a payment by a failing debtor to a preferred and particular creditor is not only not fraudulent, but is unassailable

even where the creditor well knows that the debtor is insolvent. The only test is whether the debt is an honest one.

Tompkins vs. Hunter, 149 N. Y., 117.
Delaney vs. Valentine, 154 N. Y., 692, at 700.
Shotwell vs. Dixon, 163 N. Y., 43.

In Dodge vs. McKechnie, 156 N. Y., 514, at 520, the Court says:

> "This Court has very recently in Tompkins vs. Hunter (149 N. Y., 117) considered this precise question and restated the doctrine of the common law, which has never been departed from in this State, that in the absence of statutory restrictions an insolvent debtor has the right to sell and transfer the whole or any portion of his property to one or more of his creditors in payment of or to secure his debts, when that is his honest purpose, although the effect of the sale or transfer is to place his property beyond the reach of his other creditors and render their debts uncollectible."

An instructive case under the Bankruptcy Act existing in England in 1878, which contained provisions similar to the present act is *Ex parte* Stubbins *Re* Wilkinson, 17 Chancery Division, 58 at page 68. In its decision the Court uses the following language:

> "But it was pressed upon us, that the transfer of goods to a purchaser for value with the view of using the purchase money for a voluntary preference, the purchaser knowing this intention, was a fraudulent conveying away or transfer within the meaning of the sixth section of the Bankruptcy Act. It appears to me that this view cannot be sustained. In truth a mere voluntary transfer impeachable only on the ground that it is a preference to a particular creditor has never been held to be, in itself, a fraud or an act of bankruptcy. It may be im-

> peached on the ground that it is voluntary, but it is impossible, as it appears to me, to hold that a mere voluntary transfer is of itself an act of fraud, and if this is not fraudulent within any principle of law it would be equally impossible to say that a sale becomes fraudulent because there is an intention in the mind of the vendor to use the purchase money for the purpose of making a voluntary preference, and the purchaser knows that this is the motive of the sale and the intention of the vendor with reference to the proceeds of the sale. It appears to me that it would be an extravagant extension of the doctrine of fraud on the Bankrupt Law to hold that such a sale under such circumstances is of itself a fraudulent act or an act of bankruptcy."

The learned Trial Judge, therefore, was in error on the proposition of law which in his charge to the jury he stated as applicable to the facts in the case at bar. The moneys Fellerman obtained from the defendant were used by him to pay legitimate debts, and at the time he was put into bankruptcy he still had on hand a large amount of assets applicable to the payment of his remaining debts. As Fellerman's action in paying legitimate debts was not a fraud, as a necessary consequence, the defendant, who is charged with having done nothing but advanced him money for that purpose, cannot possibly be guilty of any fraud. The Circuit Court of Appeals was entirely right in their view of the law.

If this had been a common law action the verdict of the jury must have been reversed. Being an equity action the Circuit Court of Appeals properly ordered such a final decree as in its judgment was warranted by the facts and the law.

SECOND.

There was no evidence of want of good faith on the part of defendant or to justify a finding that the defendant knew or had reason to believe at the time it made loans to Fellerman that he was insolvent. Therefore the second element which was necessary to be proven in order to justify a recovery was lacking, even assuming that there had been any proof of fraudulent intent on Fellerman's part.

The undisputed facts show that the defendant was a corporation engaged in the business of lending money on outstanding accounts (p. 105); that Fellerman was a total stranger to the president and the active officers in the defendant company (pp. 150-57); that he had been in the cloak and suit business in this city for about sixteen years (pp. 27-28); that he was a man of good standing and repute in the community, and that his credit rating both in Dun's and Bradstreet's was from fifty to seventy-five thousand dollars, with good credit (pp. 87-107). That when Fellerman took the loans in question from the defendant he entered upon a written contract with the defendant on its regular printed form, and that that contract contained the customary and usual provisions inserted by the defendant in contracts of this kind with all of its customers in a similar line of business (pp. 204-7, 120-106, 108-9). It is also undisputed that outside of the regular charges made by this defendant to Fellerman there was no benefit or profit to the defendant in the transaction; that it did not know to whom the debts which Fellerman paid with the money received from the defendant were owing; that he did not know and had never met or spoken to Fellerman's attorney, and did not know that he had an attorney (p. 117). The evidence does not show any reason why the defendant should have entered upon a fraudulent transaction.

Fellerman testified that he had not stated to the defendant his financial condition and had not stated that he was insolvent (p. 57). The utmost that Fellerman, who admitted that he had a personal animus against Mr. Levison (p. 56), could be forced to state was that he had told defendant he was pressed for money, that he had a note to meet and that was why he wanted to borrow the money, and that the defendant's president suggested to him that for the equity above the amount advanced by the defendant on the account he, Fellerman, could purchase stock in the defendant company which he might transfer to anybody he wanted to (pp. 58-9). This witness had already been committed for contempt of Court on a previous hearing in bankruptcy proceedings for wilful perjury at the instance of the plaintiff (p. 44). The Court (p. 194) did not place much credence in Fellerman's testimony and on Fellerman's cross-examination he made such a lamentable exhibition that the Court was constrained to warn him that he must properly answer the questions of defendant's attorney (p. 51). The Court further pointed out the unlikelihood of the claim that Mr. Levison should have suggested to Fellerman that he buy stock in the company for the equity of the accounts (p. 192). Mr. Levison positively denied that any such statement had been made by him and testified to precisely what had occurred when Fellerman called upon him for the loan (pp. 111-106-108). It was further shown by the defendant and not disputed, that it had taken all the usual precautions in such cases when the accounts are transferred to it, had immediately notified all the debtors on the accounts transferred, had caused its representatives, as was its custom, to go to the defendant Fellerman's place of business and stamp on its books what accounts were transferred to defendant; had at once made entries in its own books of the transaction and

had kept accurate account of all its collections and dealings with regard to the assigned accounts (pp. 81-94-105-165-181-111-114-99-100-108-168).

It was also shown that Mr. Levison had hesitated in making the advances, to lend the money, until he had obtained a confirmation of the accounts transferred to him, and that a suggestion had been made to him because he hesitated, that he might procure further security in the form of a guaranty from a man named Schiller, and he had stated that he would take all the security he could get, but it was not clear whether he ever actually received such guaranty (pp. 150-151-156).

Much time was taken up at the trial of the case with regard to the charges made by the defendant to Fellerman on the transaction, but it remained wholly undisputed that those charges were the defendant's regular charges, nor was it either shown or claimed that any banker in the same line of business with the defendant made any different or smaller charges (pp. 120-106-109). The charges made by Mr. Nathan, the defendant's attorney, were all made subsequent to the failure and therefore had no bearing upon the transaction or acts of the parties prior to the failure. The defendant produced not only its books but all of its employees who had had anything to do with the transaction, including Mr. Debold, who had been secretary of the company and had long since left its employ, and who had absolutely no interest in the transaction at all; and all of these witnesses testified that the transaction was conducted in the ordinary regular course of defendant's business (pp. 166-170, 94-95). Indeed, the learned trial Court itself, as appears from the argument that took place when defendant moved at the close of plaintiff's case to dismiss the complaint, had entertained the very grâvest doubts as to whether plaintiff, even under the Court's view of the law, had

made out any case (pp. 76-77). Upon that argument, the Court appears to have been misled as to the testimony given on behalf of the plaintiff by the argument advanced by plaintiff's counsel. At pages 77-78, in arguing to the Court, plaintiff's counsel stated that Fellerman had testified that Mr. Levison suggested to him that if he wanted, he could take stock in the defendant company and transfer it to his wife or children, and that "then it cannot be traced or found out," and again repeated that statement. Plaintiff's counsel, also under guise of objecting to a question asked by defendant's counsel, in cross-examining Fellerman, stated to the Court that Fellerman had testified that Mr. Levison had told him or suggested to him that he should take stock in the defendant corporation; that he could give it to his wife or daughter or somebody else "and nobody need to know it" (p. 53). It is obvious that this continued misstatement of the evidence led the Court into the error of believing that it had been given. There is absolutely not one word of such testimony in the record. Counsel also stated to the Court that the testimony showed that the defendant's bookkeeper had gone to Fellerman's place of business and looked through the ledger from beginning to end, evidently thereby intending the Court to infer that as the bankrupt was insolvent and defendant's bookkeeper had looked through his books, he must have seen from the books that he was insolvent (pp. 75-78). The fact is, that plaintiff's own witness, Miss Fellerman, testified that the only book which defendant's bookkeeper examined was the sales ledger for the purpose of stamping the transferred accounts, which was corroborated by defendant's bookkeeper (pp. 35-95), and it is conceded that after the accounts were transferred to the defendant to secure its loan, there was still a substantial amount of good outstanding accounts remaining with Fellerman which he subsequently transferred

to two other parties, Gordon and Stich, for a large sum of money (pp. 34-214, 41-43), entirely without the knowledge of defendant.

It was not until counsel had addressed this argument to the Court and in his argument had interjected statements wholly unwarranted by the evidence, that the Court allowed itself to be persuaded not to follow its original inclination to dismiss the complaint.

The reference to the omission of the words "attorney's fees" from the contract signed by Fellerman and their appearance in the copy furnished to the trustee's attorneys as made in appellant's brief on pages 8 and 9 was not a fair statement as the record, pages 160-161 shows that complainant's counsel expressly conceded that the defendant had not inserted these words in the contract after its execution.

On the whole record, we submit that there was no evidence upon which to find that Mr. Levison knew or had reasonable cause to know that Fellerman was insolvent at the time he obtained from him the loans in question. It must be borne in mind that one of the chief reasons why merchants discount accounts is because they require more ready money than their ordinary banking facilities enable them to obtain, and that there are large numbers of merchants who are perfectly solvent and yet who on frequent occasions are without ready money to meet their current obligations or to discount their bills. The present bankruptcy law was specifically designed to protect merchants, whose assets at their fair valuation exceeded their liabilities, from proceedings brought against them merely because they lacked ready money to at all times meet their current bills. Insolvency under the present law does not mean as it did under the former law, and as it does under other bankruptcy acts, inability to meet current obligations, but the act specifically says: "That a person shall be deemed insolvent within the provisions of

this act whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed or removed, to hinder, delay and defraud his creditors, shall not at a fair valuation be sufficient in amount to pay his debts" (Paragraph I [15] Bankruptcy Act). The courts have uniformly construed this language according to its actual meaning, and have held that it makes no difference whether or not a man has present obligations which he cannot meet, so long as the actual value of his property is in excess of his liabilities.

In re Hines, 144 F. R., 142.
In re Andrews Hardy v. Gray, 144 F. R., 922.

In this latter case the Circuit Court of Appeals in the First Circuit referring to the case of *Re* Pettingell & Co., 135 Fed Rep., 218, used this language:

> "There, marked and numerous indications of insolvency in the natural business sense of the word existed, but it was justly said that 'grounds for reasonable belief in a present inability to pay debts in the course of business are not necessarily grounds for believing that a man's property at a fair valuation is not sufficient to pay his debts."

The definition of insolvency was entirely lost sight of in the trial of this case, and throughout the trial before Judge Holt the statement of Fellerman that he had told Mr. Levison that he was pressed by his creditors, and had to meet a note and needed this money for that purpose, was assumed as evidence of knowledge on Mr. Levison's part that Fellerman was insolvent. Such an assumption was wholly unwarranted under the foregoing definition.

POINT III.

In reply to the statements in appellant's brief, contained in his second and sixth points regarding the disposition of the moneys advanced on the second assignments, complainant's evidence showed that all of this money was used to pay creditors.

In the appellant's second point, pages 11 to 16, he asserts that the second advance made by the National Discount Company to Fellerman on August 18th was not accounted for by him, and in his sixth and ninth points he claims that the decree of the Circuit Court should be reversed *pro tanto*.

The amount of that advance was $1,392.73, from which the commissions on both assignments were deducted, leaving the net amount $1006.33, which Fellerman received on August 18th, 1905.

Both the District Judge and the Circuit Court of Appeals found that this money was actually used to pay creditors.

The statement by appellant, on page 13 of his brief, that "It is not true that the second installment of $1000 was used to pay creditors," is a mistake. The evidence offered by complainant shows plainly that this $1000 was used to pay creditors.

At page 40 of the record the complainant's witness Fellerman testified as follows:

> "Q. Can you tell me what you did with that $1000? A. I must have deposited it because I paid it out in checks. I remember that it was paid out the same day that I got it to O. L. Dommerich and I gave him that out, paid that

commission house the same day I got the money."

Later, at page 58 of the record, the same witness stated in answer to complainant's counsel that he does not know whether he deposited this money in the bank or paid it out on the pay roll, but that he had paid it out and did not keep a dollar of it for himself or from his creditors.

POINT IV.

In reply to the so-called "transaction of Leonard Bronner" referred to in sub-division D of Point III in appellant's brief, we claim that this so-called transaction was absolutely irrelevant and that the defendant was not connected with it in the slightest degree.

The testimony which was permitted on this subject shows the extreme latitude given the complainant in his endeavor to prove some bad faith on defendant's part. It appeared from Fellerman's testimony that he was called up on the telephone and advised to see a lawyer, Mr. Leonard Bronner, and that he afterwards called on Bronner and Bronner informed him that he, Fellerman, was about to fail, and that Fellerman should retain him as his attorney and that he did retain Bronner as his attorney.

There was not a particle of evidence offered to show that the National Discount Company or Mr. Levison or anyone connected with him had anything what-

ever to do with this retainer of Mr. Bronner. On the other hand it appeared from Mr. Bronner's testimony that he was retained at the suggestion of Fellerman's son-in-law, Woerblin.

It was further shown that at the time of Fellerman's failure Bronner had never heard of the National Discount Company or Mr. Levison, and Mr. Levison knew nothing about Mr. Bronner and did not meet him or know him until some two years after this occurrence (pp. 81-117); but notwithstanding, it was urged by way of innuendo that in some way entirely undisclosed, Levison was connected with Bronner and had suggested in same way to Bronner that Fellerman was about to fail.

The Circuit Court of Appeals properly ignored this entire matter as unworthy of any attention and we hardly expected that counsel for the appellant would urge it upon the attention of this Court. It was wholly irrelevant and without any basis of evidence either direct or indirect.

POINT V.

In reply to the statements contained in sub-division E of Point Three of appellant's brief regarding the nature of the defendant's business and its business methods, and entitled "The additional badges of fraud," we claim that these so-called badges of fraud did not exist in fact and that the nature and methods of defendant's business afford not the slightest evidence of any bad faith in this transaction.

The business of discounting or advancing money on merchandise accounts is a well recognized and entirely legitimate business in which a very large number of concerns are engaged and the transactions in this kind of business involve large amounts of money annually.

The State and National Banks do not make a practice of discounting merchandise accounts and the concerns which are engaged in this special line of business are not competing with the banks.

The transactions are on a wholly different footing from those of making loans on commercial paper.

On taking over the accounts the Discount Company expects to get its money back not by repayment of a loan at a stated time but by collection of the accounts as they fall due from time to time. The Discount Company must practically keep the ledger accounts of all its customers and keep track of each account, drum up the debtors, collect from them, conduct correspond-

ence regarding returns, discounts and so forth and also furnish advice to the customers in regard to the extending of credit based upon their experience from handling accounts of their other customers.

In so doing the discount company relieves the customer of much work which the customer would have to do and also of considerable expense in its office force. In fact the Discount Company becomes to a certain extent the credit department of its customer.

As was shown from the books and records which were produced upon this trial, a very elaborate system of accounts must be kept in order to attend to all these matters, involving much clerical labor. For all the special work thus required the Discount Company makes a charge by way of commissions upon the accounts which it handles. This charge varies from two and one-half to five per cent. In certain classes of business it is higher than in others. And in the class of business in which Fellerman was engaged, the undisputed evidence shows that the customary charge was five per cent on the accounts assigned and accepted. Furthermore Mr. Levison offered to reduce the commission to three per cent if Fellerman's business should amount to $100,000 a year (Record, p. 108). The undisputed evidence also shows there was sufficient reason why in this class of business the commission was somewhat higher than in other lines of business owing to the class of goods dealt in and the frequency of returns and the fact that the goods were seasonable goods and so forth. For any negligence or errors in properly handling collections of these accounts the Discount Company would doubtless be liable to its customers.

The Discount Company was to advance 75% on the face value of the assigned accounts as soon as they had been confirmed and the fact that they were only willing to advance a portion of this 75% before the

confirmation of the accounts was certainly no evidence of bad faith or of a desire to oppress the customer.

The evidence shows further that Fellerman asked for a further advance on August 18, after receiving the second advance, and that Mr. Levison positively refused to make any more advances until the accounts which he had already assigned had been confirmed by Fellerman's debtors (Record, p. 116).

This fact shows that Mr. Levison was not intending to aid Fellerman in any attempt to dispose of his property. While this third call for money within so short a time might have been sufficient to arouse suspicions as to Fellerman's condition, yet by that time, the previous advances had already been made. Levison's refusal to make further advances without confirmation is proof that he was acting in good faith in the matter.

If Fellerman had not failed the business which was initiated would have been consummated and on the confirmation of the accounts the remainder of the 75% would have been advanced in the regular course of business on the accounts where the customers were rated. The commissions were deducted from the second advance in the expectation that the full advances were to be made and that the accounts were to be handled in the customary manner.

Let us see just what the course of this transaction would have been if the original contract had been consummated and if the business had taken its regular and expected course. The first assignment covered accounts amounting to $5232.29 and the second assignment covered accounts amounting to $2495.50, making a total for the two assignments of $7727.79. Now the total amount which the Discount Company might be called upon to advance on these accounts was 75% thereof, or $5795.91, assuming that they were all confirmed, *i. e.*, acknowledged by the customers of

Fellerman to be valid accounts and that they were rated. Deducting the agreed commission of 5%, or $386.49, would leave the net cash to be advanced $5409.42.

The actual amount collected on the accounts up to the time the Discount Company turned them back to the trustee of Fellerman was $5612.71, which was somewhat less than the total expected advance of 75%. There was still uncollected accounts aggregating $1528.71, and it does not appear whether these were subsequently collected or not by the trustee. If Fellerman had continued in business any surplus of course would have gone back to him.

It is not fair to claim an exorbitant charge because the amount advanced at the beginning of the transaction was only about $4000 and the commissions were some $386. The commissions were based upon the expectation that the transaction would be consummated, and the advances completed as originally agreed, in which case the commissions charged would certainly have been fully earned. There was nothing whatever in the transaction which was extraordinary or exorbitant. The appellant's brief (p. 32) assumes that this was intended to be an isolated transaction. But the contract between the parties shows that there were to be continuing transactions of which this was only the beginning. On commencing the business the customer would naturally bring in accounts already on his books for discount, but it was expected and provided in the contract that as he made new accounts from time to time, these were also to be brought in for discount. But Fellerman failed before the transaction was completed and before the Discount Company had any opportunity to get the accounts confirmed and to complete the advances on them. From this fact the appellant argues that the unconsummated transaction was extraordinary and the terms oppressive. He might just as reasonably assert that *because* Fellerman failed on August 19th, *therefore* the Dis-

count Company was bound to know on August 18th that he was going to fail, although on August 18th Fullerman had a rating of $50,000 to $75,000 with good credit.

The fact that this advance was made in cash was wholly immaterial, as the cash was immediately deposited in Fellerman's bank and paid out to legitimate creditors. In fact, the first advance of $3000 was given in a check which Fellerman took to the defendant's bank and had cashed (Record, p. 168) and then deposited the proceeds in his bank.

The subsequent action by Levison in proceeding to collect the accounts through an attorney certainly cannot be held as proof to indicate bad faith on his part when he made the advances.

As soon as Fellerman failed and inasmuch as the accounts had not been confirmed, the Discount Company had an absolute right to protect themselves and to recover the amounts of the accounts by such steps as they deemed best. If they had no right to charge up the legal fees which they paid against the accounts that was merely a question to be settled on an accounting; but by no possible stretch of imagination could their action in this regard after the failure be construed into a guilty knowledge or notice of an expected failure at the time the advances were made.

The appellant's brief contains many suggestions of sinister intent on the part of the defendant and parades various circumstances as "badges of fraud" which are wholly unwarranted by the facts. The truth is that the suit was brought and tried by the plaintiff and was decided by the Trial Court, upon the theory that it was a fraud under Sec. 67-E of the Bankrupt Act for an insolvent debtor to apply his money or assets to prefer one or more of his creditors instead of distributing the same rateably, and the defendant was liable because he had notice of facts and

circumstances sufficient to charge him with knowledge that Fellerman was insolvent and intended to prefer some of his creditors. When this theory of liability was repudiated by the Circuit Court of Appeals the appellant's counsel like the drowning man who grasps at straws, fell back upon the theory that the defendant engaged in a scheme with Fellerman to defraud the latter's creditors and assisted him, Fellerman, in placing his assets beyond their reach. As an illustration, the fact that the $3,000 was advanced by the defendant in a check which Fellerman got cashed and that the other advance was in money is seized upon, and exploited in italics, as "PAID IN SUCH A MANNER AS TO LEAVE NO TRAIL." Not only was that a perfectly natural and innocent transaction, but throughout the dealings between the two men a trail was left as wide as a boulevard to direct creditors to Fellerman's disposition of his accounts, to wit: The assignment of the accounts was noted or stamped on Fellerman's ledger in order to show that they were payable to the National Discount Co., and this was the regular custom of the National Discount Co., and was so provided in their contract with Fellerman. (Record, f. 95, 100, and page 206, where the contract states as follows: "The customer agrees that any account transferred to the banker will have this transfer properly entered in his ledger, stating that this account is the property of the National Discount Co.")

In view of this fact, the omission in the appellant's brief to charge Levison with complicity in the destruction of Fellerman's books is a surprising exhibition of moderation. It is a sufficient and conclusive answer to all these suggestions and virulent insinuations of fraud, that every dollar Fellerman obtained from defendant by the pledge of accounts went to Fellerman's creditors, and they received the full value of

the accounts less the deductions which the defendant by its contract (and its customary contracts of a similar kind) became entitled to retain for interest, commissions and expenses.

POINT VI.

In reply to appellant's Seventh Point in regard to the question whether the use of the borrowed money to pay preferred debts was a fraudulent act so as to render the assignment of the accounts subject to attack under Section 67 E of the Bankruptcy Act, we repeat our former proposition that the view taken by the Circuit Court of Appeals was correct and we claim that the authorities cited by the appellant under this heading do not show that there was any error in that position.

We have examined the cases cited by the appellant, to wit:

In re Berman, 112 F. R., 663.
Roberts vs. Johnson, 151 F. R., 567.
In re Pease, 129 F. R., 448.

In all of these cases the action taken might really have been considered an action to recover preferential payments inasmuch as in all of them the party who advanced the money and took the mortgage as security

was virtually acting on behalf of or in the interest of the favored creditor who was to receive the money.

Furthermore these were all cases where a merchant placed the mortgage upon his entire stock in trade and raised money thereby for the purpose of paying certain creditors in whose interest the parties advancing the money were acting. It was stated in one of these cases that the mere fact that a merchant raises money in this way and for this purpose is in itself a practical confession of insolvency as it is an act entirely outside of his usual course of business. These cases, therefore, stand on a wholly different footing from the case at bar. In the present case the action of Fellerman in entering into arrangements with the National Discount Company for handling his accounts was an action in the regular course of business. It was the usual business of the National Discount Company in which they were engaged. There was nothing in the transaction out of the regular course so far as they were concerned.

POINT VII.

It is respectfully submitted that the decree appealed from should be affirmed, with costs.

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In reply to the so-called "transaction of Leonard Bronner," referred to in Sub-division D of Point III in appellant's brief, we claim that this so-called transaction was absolutely irrelevant and that the defendant was not connected with it in the slightest degree 25

POINT V.

In reply to the statements contained in Sub-division E of Point III of appellant's brief, regarding the nature of the defendant's business and its business methods, and entitled "The additional badges of fraud," we claim that these so-called badges of fraud did not exist in fact and that the nature and methods of defendant's business afford not the slightest evidence of any bad faith in this transaction 27

POINT VI.

In reply to appellant's Seventh Point, in regard to the question whether the use of the borrowed money to pay preferred debts was a fraudulent act so as to render the assignment of the accounts subject to attack under Section 67-E of the Bankruptcy Act, we repeat our former proposition that the view taken by the Circuit Court of Appeals was correct, and we claim

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that the authorities cited by the appellant under this heading do not show that there was any error in this position 33

POINT VII.

It is respectfully submitted that the decree appealed from should be affirmed with costs .. 34

CASES CITED BY APPELLEE:

In re Andrews; Hardy v. Gray, 144 F. R., 142 23
Basey v. Gallagher, 20 Wall, 670 11
In re Bloch, 142 Fed., 674, 676, 677 14
Coder v. Arts, 152 Fed., 943 14
Coder v. Arts, 213 U. S., 223 15
Delaney v. Valentine, 154 N. Y., 692, at 700 .. 16
Dodge v. McKenzie, 156 N. Y., 514, at 520 16
Githens v. Schiffler, 112 Fed., 505 14
In re Hines, 144 F. R., 142 23
Johnson v. Harmon, 94 U. S., 371 11
Oilwell Supply Co. v. Hall, 128 F. R., 875 11
In re Pettingell & Co., 135 Fed. Rep., 218 23
Shotwell v. Dixon, 163 N. Y., 43 16
Ex parte Stubbins *re* Wilkinson, 17 Chancery Division, 58, at 68 16
Tompkins v. Hunter, 149 N. Y., 117 16
Watt v. Stark, 101 U. S., 247 11